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No. _____

In The

Supreme Court of the United States

October Term, 1995

OUTDOOR COMMUNICATIONS, INC.,

Petitioner,

v.

CITY OF MURFREESBORO, TENNESSEE,

Respondent.

Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether striking the entire sign ordinance, as opposed to severing its unconstitutional provisions, is the proper remedy when the effect of severance is to restrict more speech than the enacting body intended?

2. Whether a city may make it a crime to fly an American flag in excess of four and one-half square feet, although the size of the official American flag is 13.35 square feet?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

1. *Outdoor Communications, Inc. v. City of Murfreesboro, Tennessee*, No. 94-5406 (6th Cir., June 30, 1995). App., *infra*, p. 1a.

2. Order and Memorandum, United States District Court for the Middle District of Tennessee, Case No. 3-90-0231, entered February 25, 1994. App., *infra*, p. 10a.

3. Magistrate's Report and Recommendation, United States District Court for the Middle District of Tennessee, Case No. 3-90-0231, entered September 11, 1992. App., *infra*, p. 26a.

STATEMENT OF JURISDICTION

1. The date of the entry of the judgment or decree sought to be reviewed is June 30, 1995. On that date the United States Court of Appeals for the Sixth Circuit affirmed the order of the United States District Court for the Middle District of Tennessee granting a portion of petitioner's motion for summary judgment and granting a portion of respondent's motion for summary judgment.

2. On August 17, 1995, the United States Court of Appeals for the Sixth Circuit entered an order denying petitioner's petition for rehearing and suggestion of rehearing en banc.

3. The statutory provision which confers jurisdiction on this Court to review the judgment or decree in question by writ of certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND ORDINANCES

1. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

2. Numerous provisions of the Murfreesboro sign ordinance are in issue in this case. Because these provisions are lengthy, the text of these provisions of the ordinance are set forth in the appendix attached hereto at pp. 58a-123a.

STATEMENT OF THE CASE

Statement of Facts

Petitioner is a corporation engaged in the outdoor advertising business in the southeastern United States. Petitioner owns off-site signs, commonly known as billboards, in the City of Murfreesboro, Tennessee. Murfreesboro is petitioner's second largest market in Tennessee. App., *infra*, p. 125a.

Petitioner's billboards are located on private property and not on the public right-of-way. App., *infra*, p. 126a. Each billboard is a permanent structure with faces upon which messages can be posted or painted. Petitioner displays commercial and noncommercial messages on its signs and desires to construct new off-site sign structures in the City of Murfreesboro.

The sign ordinance adopted by the City of Murfreesboro in 1990 regulates the erection and maintenance of all signs in the city. As interpreted by the Sixth Circuit Court of Appeals, the ordinance restricts all noncommercial permanent signs, including American, Tennessee and county flags, to four and one-half square feet in size anywhere within the city.[1] App., *infra*, pp. 4a-5a. Because Section 14 of the ordinance makes it a misdemeanor to violate the ordinance, the Sixth Circuit has become the nation's first court to hold that a municipality, in the furtherance of aesthetics, may make it a crime to display an American, state or county flag in excess of four and one-half square feet.

The Murfreesboro sign ordinance makes a distinction between off-site and on-site signs. Off-site signs are signs "which direct attention to a business, profession, commodity, service or entertainment, which is not primarily conducted, sold or offered upon the same lot of record." App., *infra*, p. 69a. On-site signs direct "attention to a

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[1] The size of the typical American flag used for residential purposes, such as those flown over the United States Capitol and delivered to constituents by members of Congress, is 2.67 feet by 5 feet, or 13.35 square feet. Flags flown in front of governmental and other buildings are much larger.

business, profession, commodity, service or entertainment, which is primarily conducted, sold or offered upon the same lot of record." App., *infra*, p. 70a. Off-site signs are permitted only in certain commercial and industrial zoning districts. However, the property on which an off-site sign is to be erected must be contiguous to the interstate highway.

There is only one interstate highway in Murfreesboro traversing approximately five miles. App., *infra*, p. 125a. Each off-site sign must be at least five feet and no more than 200 feet from the interstate highway right-of-way. Off-site signs must also be at least 1000 feet away from any other off-site permanent sign in both directions on the same side of the interstate highway, and at least 1000 feet from an interchange or intersection. App., *infra*, pp. 101a-102a. The effect of these restrictions is that no new off-site sign structures can be erected by a private company in the City of Murfreesboro.[2] This is so because there are no locations adjacent to the interstate highway which conform to the ordinance's requirements. Thus, the sign ordinance prohibits the construction of any new off-site signs in Murfreesboro. App., *infra*, pp. 125a-126a.

On-site business identification signs are generally allowed by the sign ordinance. There are restrictions on the size, height and number of these signs. App., *infra*, pp. 91a-101a. The message displayed on an on-site sign is

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[2] In Sections 2(21) and 6(B) of the ordinance, the city reserved the option to erect "governmental signs" which may contain commercial or noncommercial messages anywhere within the city. App., *infra*, pp. 67a, 82a. The City of Murfreesboro could therefore enter the billboard business.

restricted to the business conducted at the property where the sign is located. The ordinance requires a permit for all on-site and off-site signs, except those which are specifically identified as being exempt. App., *infra*, p. 73a. Noncommercial messages may be substituted on an off-site or on-site sign provided the substitution does not violate Section 7 of the ordinance entitled "Prohibited Signs." App., *infra*, pp. 69a-70a.

Section 12 of the ordinance governs nonconforming signs. It provides that a nonconforming sign shall not be enlarged, expanded, extended, or structurally altered so as to create an additional nonconformity or to increase the extent of the existing nonconformity. A nonconforming sign cannot be removed and replaced or reconstructed at a different property unless the replaced sign conforms with the sign ordinance. App., *infra*, p. 107a. A nonconforming sign can be removed and replaced or reconstructed on the same lot of record if it conforms to certain specified height and sign area limitations.

Since the sign ordinance effectively prohibits the erection of any new off-site signs or billboards in the city, petitioner has challenged the constitutionality of the ordinance. Although the district court and the Sixth Circuit Court of Appeals determined the many provisions of the ordinance violate the First Amendment, these provisions were severed leaving in effect an ordinance which still prohibits any new billboards, makes it a crime to display an official flag, and restricts more speech than the original ordinance. For these reasons, petitioner seeks a writ of certiorari and implores this Court to declare the entire sign ordinance unconstitutional.

History of Proceedings

This action was commenced on March 16, 1990, when petitioner filed a complaint challenging certain provisions of the sign ordinance of the City of Murfreesboro, Tennessee. In response, Murfreesboro repealed the challenged ordinance and enacted a new sign ordinance effective August 31, 1990. App., *infra*, p. 58a. Petitioner then filed an amended and restated complaint challenging the new ordinance on constitutional and other grounds.

Petitioner filed a motion for summary judgment on its amended and restated complaint. Respondent filed a cross-motion for summary judgment. The trial court granted petitioner's motion for summary judgment in part and also granted respondent's motion in part. The petitioner appealed from the trial court's order and the Sixth Circuit Court of Appeals affirmed the order on June 30, 1995. The petitioner's petition for rehearing and suggestion for rehearing en banc was denied on August 17, 1995.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Erred In Refusing To Strike As Unconstitutional The Entire Murfreesboro Sign Ordinance And Instead Severing Its Unconstitutional Provisions Because The Effect Of Severance Is To Restrict More Speech.

The trial court decision which the Court of Appeals upheld declared Sections 6(B)(1), 6(B)(2), 6(B)(4), 6(B)(5), 6(B)(6), 6(B)(7), 6(B)(9) and 6(B)(12) of the Murfreesboro

sign ordinance violative of the First Amendment. The trial court and the Court of Appeals refused to declare the entire ordinance unconstitutional, allowing the remaining portions to be enforced.

The stricken provisions of Section 6(B) exempt from the fee and permit requirements of the ordinance American, state and county flags; address signs; convenience signs; governmental signs; holiday decorations; name and address plaques; scoreboard and ballfield fence signs; and signs painted on the outside glass surfaces of windows or doors indicating the name, address and hours of the business conducted therein. No other provisions of the sign ordinance allow these types of signs.

To determine the effect of striking these provisions requires a review of Sections 3(A) and 7(AA) of the ordinance. Section 3(A) provides as follows:

> It shall be unlawful for any person, corporation, or association to erect, prepare, alter, relocate or keep within the City any sign or other advertising structure as defined in this ordinance on a lot of record without first obtaining a sign permit from the Building Inspections Department and paying the permit fee required by this section.

App., *infra*, p. 73a.

Section 7(AA) of the ordinance provides as follows:

> It shall be unlawful for any person to erect or maintain a sign which is prohibited as follows: . . . signs which are not expressly permitted by this ordinance. . . . This section supersedes any other section that is contrary.

App., *infra*, p. 87a.

Under Sections 3(A) and 7(AA) of the ordinance, unless a particular type of sign is expressly allowed or exempted, it is prohibited and cannot be constructed or displayed in the city. Thus, the effect of eliminating the exemptions provided by Sections 6(B)(1), 6(B)(2), 6(B)(4), 6(B)(5), 6(B)(6), 6(B)(7), 6(B)(9) and 6(B)(12) is to create a ban on the types of signs previously allowed by the exemptions. Flags, address signs, convenience signs, governmental signs, holiday decorations, address plaques, ballfield signs, and signs on glass surfaces are now illegal.

Despite this clear result, the Court of Appeals ruled that the entire ordinance is saved by Section 6(B)(10) which allows noncommercial permanent signs not exceeding four and one-half square feet in area.

Thus, the Sixth Circuit Court of Appeals has determined that it is constitutionally acceptable to interpret a sign ordinance in a manner which restricts more speech than the city council intended. The Murfreesboro city council clearly intended that the types of signs and flags described in Section 6(B) of the ordinance could be posted and flown without the necessity of obtaining a permit and paying a fee. In addition, no size limitations on these types of signs and flags was expressed or intended. By interpreting the ordinance to allow these types of signs pursuant only to the four and one-half square foot size limitation imposed by Section 6(B)(10), the Court of Appeals construed the ordinance to restrict more speech.

The Sixth Circuit Court of Appeals has directly contradicted the holding of the Third Circuit Court of Appeals in *Rappa v. New Castle County*, 18 F.3d 1043 (3rd

Cir. 1994). In *Rappa*, the Third Circuit considered the severability of a portion of a subchapter of the Delaware Code entitled "Regulation of Outdoor Advertising," Del. Code Ann. tit. 17, §§ 1101-31. The court declared unconstitutional that portion of the subchapter containing exceptions for signs announcing a town, village, or city or advertising itself or its local industries, meetings, building, historical markers, or attractions, but upheld other exceptions to the general ban on signs along certain highways. In deciding whether to allow the State of Delaware to enforce the constitutional provisions, the court stated:

> If we eliminated the exception in Subchapter I regarding advertising local industries and meetings, the rest of the statute could surely function independently. However, we are unwilling to sever the exception, because our severability inquiry here has a constitutional dimension. Eliminating the offending exception would mean that we would be requiring the State to restrict more speech than it currently does. All existing restrictions would apply, plus there would be a restriction on signs advertising local industries and meetings. To our knowledge, no court has ever mandated issuance of an injunction such as that, and we decline to be the first. In *Mosley*, without even commenting on the possibility of eliminating the exception for peaceful labor picketing, the Supreme Court struck down a statute banning picketing near a school rather than striking down the exception. *See Mosley, supra.*
>
> We refuse to strike down the exception in part because of the special status of speech in our constitutional scheme, a scheme which generally favors more speech. A second reason is

> that if courts were to sever exceptions from content discriminatory statutes, individuals would lose much of their incentives to challenge such statutes for those whose speech is banned would often not benefit from the remedy. For example, Rappa would remain unable to post signs if we decided to eliminate the content-based exception in Chapter 11. Thus, we hold that the proper remedy for content discrimination generally cannot be to sever the statute so that it restricts more speech than it did before – at least absent quite specific evidence of a legislative preference for elimination of the exception. Absent a severability clause much more specific than § 308, we refuse to assume that the Delaware legislature would prefer us to sever the exception and restrict more speech than to declare Subchapter I invalid.

18 F.3d at 1072-73. Thus, the Third Circuit refused to sever the unconstitutional provisions of the Delaware statute because to do so would require the state to restrict more speech than it currently does, and severance would discourage challenges to unconstitutional ordinances.

The opinion of the Sixth Circuit in this case is in direct conflict with the Third Circuit's holding in *Rappa*. This Court should grant petitioner's application for the writ of certiorari under Supreme Court Rule 10.1(a) in order to resolve this conflict between the circuits and provide guidance to lower courts in determining when an entire ordinance should stricken and when severance is appropriate.

II. The Court Of Appeals Erred In Upholding The Murfreesboro Sign Ordinance Because The Ordinance Makes It A Crime To Fly An American Flag In Excess Of Four And One-Half Square Feet.

The Court of Appeals has interpreted the Murfreesboro sign ordinance to allow American, state and county flags to be flown subject to the limitations of Section 6(B)(10) of the ordinance which restricts their size to four and one-half square feet in area. Section 14 of the ordinance makes it a misdemeanor to fly a larger sign.[3] App., *infra*, pp. 113a-114a. The Sixth Circuit's construction of Section 6(B) of the Murfreesboro sign ordinance conflicts with this Court's decisions in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), and *United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990).

In *Texas v. Johnson, supra*, this Court considered the conviction of an individual under a Texas statute prohibiting the desecration of a state or national flag. After first determining that actions taken with respect to the American flag can be expressive conduct protected by the First

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[3] While the court stated in its opinion that a larger flag could be flown with a permit or a variance, the ordinance does not provide for the issuance of a flag permit and it is absurd to impose an obligation on citizens to obtain a variance from the city before they display the flag.

To obtain a variance, an applicant must file a written application accompanied by an as-built site plan showing dimensions of the applicant's lot; pay a $50.00 fee; and attend a public hearing. App., *infra*, pp. 117a - 119a. The variance cannot be granted absent a hardship peculiarly applicable to the applicant's property. App., *infra*, p. 120a. Thus, the grant of a variance is not automatic.

Amendment, the Court concluded that the conviction of Gregory Lee Johnson for flag desecration was inconsistent with the First Amendment. In response to *Texas v. Johnson, supra,* the Congress enacted the Flag Protection Act of 1989, 103 Stat. 777, 18 U.S.C. § 700 (1988 ed. and Supp. I). In *United States v. Eichman, supra,* the Court concluded that prosecuting an individual for burning a flag in violation of the Flag Protection Act is also inconsistent with the First Amendment.

Unless the Sixth Circuit's opinion in this case is reversed, Murfreesboro cannot prosecute an individual charged with burning the American flag but can prosecute a citizen displaying an American flag in excess of four and one-half square feet. This result turns the free speech clause of the First Amendment upside down.

The important role the American flag plays as a symbol for our nation was recognized in *Texas v. Johnson, supra,* when this Court stated as follows:

> We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by – as one witness here did – according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

491 U.S. at 419-20, 109 S.Ct. at 2548. If the citizens of the Sixth Circuit are to respond to this Court's holdings in *Texas v. Johnson, supra,* and *United States v. Eichman, supra,* by respecting and saluting the flag as the Court has

urged, allowing a municipality to limit the size of all American flags to be flown to four and one-half feet takes this constitutional right away from them. The Sixth Circuit's opinion is contrary to this Court's prior rulings and the writ of certiorari should be granted under Supreme Court Rule 10.1(c) to correct this error of law.

CONCLUSION

The grant of the writ of certiorari is proper in this case under Supreme Court Rule 10.1(a) because the ruling of the Sixth Circuit in severing unconstitutional provisions of the Murfreesboro sign ordinance restricts more speech and discourages constitutional attacks on free speech violation. The Sixth Circuit's decision is in direct conflict with the holding of the Third Circuit in *Rappa v. New Castle County*, 18 F.3d 1043 (3rd Cir. 1994). Certiorari should be granted so that this Court can provide guidance to lower courts in determining whether severance or the striking of the entire ordinance is the proper course when the result of severance is to restrict more speech.

The writ of certiorari is also proper under Supreme Court Rule 10.1(c) in order to reverse the Sixth Circuit's decision which is contrary to applicable decisions of this Court. While this Court has previously held that a municipality may not criminally punish an individual desecrating the American flag if the desecration constitutes expressive conduct, the Sixth Circuit has concluded that an individual can be criminally punished for flying an American flag in excess of four and one-half square feet. The Sixth Circuit's conclusion is clearly erroneous and

inconsistent with this Court's prior holdings. Certiorari should be granted in order to correct this error.

For the foregoing reasons, the petitioner respectfully requests that its petition of writ of certiorari be granted.

This the 14 day of November, 1995.

Respectfully submitted,

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APPENDIX

No. 94-5406

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OUTDOOR COMMUNICATIONS, INC., Plaintiff-Appellant, v. CITY OF MURFREESBORO, TENNESSEE, Defendant-Appellee.	* * * * * * * * * *	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE (Filed Jun. 30, 1995)

BEFORE: JONES and BATCHELDER, Circuit Judges, and JOINER, District Judge.*

PER CURIAM. Plaintiff Outdoor Communications, Inc. ("Outdoor") is appealing an order of the district court affirming and modifying a magistrate's denial of summary judgment to Outdoor. Outdoor challenged the constitutionality of a sign ordinance and requested that the district court strike the entire ordinance rather than sever the unconstitutional portions and uphold those that passed constitutional muster. The district court denied summary judgment to Outdoor and granted partial summary judgment to the City of Murfreesboro (the "City"). We affirm the district court's judgment.

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* The Honorable Charles W. Joiner, United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

In 1990, the City of Murfreesboro adopted a sign ordinance limiting the display of commercial and non-commercial messages on outdoor, offsite signs. In March 1990, Outdoor, a corporation engaged in the outdoor advertising business, filed a complaint challenging the city ordinance. In response, the City enacted a new ordinance, and Outdoor filed an amended complaint, challenging the new ordinance on constitutional and other grounds, and a motion for summary judgment.

After the motion was referred to a magistrate, the City filed a cross-motion for summary judgment. The magistrate entered a report and recommendation, striking four provisions of the ordinance on constitutional grounds, to which both parties objected in part. The district court adopted the magistrate's report and recommendation, and modified it, striking another seven provisions on constitutional grounds. The district court then severed the unconstitutional portions of the ordinance and held that the remaining constitutional provisions would continue in effect. This appeal followed.

II. Doctrine of Elision

At oral argument, counsel for Outdoor indicated that it was appealing from the district court's denial of its motion for summary judgment, rather than appealing the partial grant of summary judgment to the City. A decision to deny a motion for summary judgment is reviewed for abuse of discretion. *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied sub*

nom. Pinney Dock & Transp. Co. v. Norfolk & Western Ry. Co., 488 U.S. 880 (1988).

In Tennessee, the doctrine of elision, which refers to the legal process of severing unconstitutional or "obnoxious" provisions of a statute so as not to invalidate an entire act, is well-established in case law. *Moore v. Fowinkle*, 512 F.2d 629 (6th Cir. 1975). Although the doctrine is not favored, courts have consistently applied elision to avoid defect of legislative intent where the statute itself includes a severability clause. *Id.* at 631. The City's ordinance contains such a severability clause.

The Supreme Court has held that "[s]everability of a local ordinance is a question of state law." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988). Therefore, the doctrine of elision will apply, as governed by Tennessee law.

The lower court eliminated eleven subsections of the ordinance on grounds that they violated the First Amendment. The resultant ordinance has the coherent effect of exempting from fee and permit requirements all signs that are either temporary or small enough not to interfere with traffic. Even though the exemptions for address plaques and flags were removed, the size exemptions remain in effect, and lend resultant logic to the ordinance. The City is therefore left with an ordinance narrowly tailored to its purpose, that being to help the public locate goods, eliminate confusion, and encourage general attractiveness. Because the ordinance, as it stands after the unconstitutional subsections have been stricken, maintains logical integrity and does not contradict the intent of the City, we conclude that the district court did not err

when it severed the unconstitutional sections and left the remaining ordinance in effect.

At oral argument, Outdoor reiterated its stance that severing the unconstitutional subsections from section 6(B) of the ordinance results in greater restrictions on speech, and that the resultant ordinance creates an unconstitutional ban on the erection of signs. Outdoor has misconstrued the ordinance. This ordinance seeks to place restrictions on the erection of signs by requiring permits and fees on all signs, banners, billboards, flags, and similar structures. In order to avoid creating an ordinance that was unconstitutionally broad, the City included section 6(B), which listed twelve categories of signs that would be exempt from permit or fee requirements. Several of these categories were struck in the lower courts on the grounds that they created an impermissible distinction between signs based on their speech content, for example, requiring fees for flags, but not for government flags.

When these content-based exemption categories were struck, the remaining ordinance required fees and permits of more types of signs than originally planned. Included, for instance, were address plaques larger than 4 1/2 feet square, however unlikely the existence of such plaques might be. It is noteworthy that the ordinance did not prohibit the erection or placement of signs altogether. As it currently stands, an individual who wants to fly a flag larger than 4 1/2 feet square must obtain a permit or a variance. One is not wholly forbidden to fly such a flag.

The fee requirements themselves are not prohibitively expensive, and they do not effectively constitute a

bar to the construction of signs. Fees consist of a one-time charge of ten dollars, plus fifty cents per square foot. Portable temporary signs require a flat fifteen dollar fee. A business or individual that did find such a fee prohibitive could appeal to obtain an economic hardship variance.

Outdoor contends that sections 3(A) and 7(AA) of the ordinance, when read together, effectively prohibit construction of signs and erection of flags in Murfreesboro. What the ordinance actually states is that it is unlawful for any person to erect a sign without first obtaining a permit or a variance from a permit, and paying a permit fee. Any sign erected without a permit, unless exempted, is unlawful. This does not ban the construction of signs in Murfreesboro. It simply requires an individual who wishes to erect a sign to do one of three things: (1) obtain a permit and pay a fee; (2) appeal for a variance from the requirements; or (3) erect a sign smaller than 4 1/2 feet square or one otherwise exempted from permit and fee requirements as set forth in section 6(B).

III. First Amendment

Outdoor also argues that the ordinance violates the First Amendment because it effectively eliminates erection of any new signs. While the First Amendment does not shield Outdoor from future economic loss, if the effect of an ordinance is to prevent any new speech from being displayed, the First Amendment can be implicated. Nothing in the ordinance, however, prohibits Outdoor from rebuilding old billboards in conformance with size

restrictions, maintaining nonconforming billboards without adding to the nonconformities, buying conforming billboards from other owners or erecting new billboards, one thousand feet from one another, on the recently completed highway frontage. Furthermore, the City of Murfreesboro has ample alternative modes of commercial and noncommercial advertising in its extensive radio, television and print publications.[1] *See Wheeler v. Comm'r of Highways,* 822 F.2d 586, 589 (6th Cir. 1987) (noting that certain restrictions on expression are valid so long as they leave open ample alternative channels for communication of the information), *cert. denied,* 484 U.S. 1007 (1988).

Although recent cases on regulation of outdoor advertising and commercial speech are slightly dissonant, the tests established in these cases are clear. *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 501 (1981). The Murfreesboro ordinance is distinguishable from the one at issue in *Metromedia,* in that Murfreesboro has not banned all offsite signs, nor has it attempted to create content-based distinctions between commercial and noncommercial outdoor, offsite billboards.

The City contends that in order to maintain its interests in eliminating confusing advertising and promoting aesthetics, it must regulate offsite billboards, such that

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[1] Outdoor makes the rather specious argument that the tobacco industry is banned from radio and television, therefore potentially excluding it from advertising if billboards are eliminated. Tobacco products, however, can be advertised in print media, which exist in Murfreesboro. Additionally, nothing prevents Outdoor from buying existing, conforming billboard space or erecting new billboards and offering them to those wishing to advertise tobacco products.

none is built within 1000 feet of another, and such that nonconforming signs do not add to their nonconforming features. Given that the City is relatively small and that current billboard use is not being eliminated, the restrictions in the ordinance are narrowly tailored to achieve the City's substantial interests. This court finds that summary judgment was appropriately denied to Outdoor and granted to the City, because alternative modes of communication are plentiful and because the ordinance, severed from its content-based restrictions, is a reasonable place and manner restriction. *See Wheeler*, 822 F.2d at 589.

At oral argument, Outdoor repeated its contention that restrictions on new billboards are unconstitutional. Its argument is based upon the claim that there are no new sites within Murfreesboro where new billboards can be constructed. We reject this contention. The City stated at oral argument that new highway frontage, recently completed in Murfreesboro, will allow the construction of new billboards in conformance with the ordinance, and this was uncontradicted. Outdoor's argument is therefore rejected as unsupported.

IV. Lack of Guidance to Appeal Board as Due Process Violation

Outdoor, moreover, contends that the ordinance, which allows for variances and relief to owners of nonconforming signs, lacks sufficient criteria to guide the City Council and Board of Zoning Appeals, and that the ordinance therefore violates the Due Process Clause of the Fourteenth Amendment. The law broadly requires clearly-defined statutory prohibitions in order to satisfy

due process. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

The magistrate held that the City's ordinance was not overbroad or vague with regard to the discretion permitted the Board of Zoning Appeals in determining when to grant a variance, and the district court affirmed on this issue. Outdoor argues, however, that section 15(d) of the ordinance, defining the standards for a variance, only supplies specific criteria for when the Board shall *not* grant variance, and that factors for granting a variance are wholly undefined and discretionary. To the contrary, the City contends that both sections 13-7-207 and 13-7-208 of the Tennessee Code and controlling case law, by which the Board is bound, describe the appropriate criteria in greater detail and provide ample guidance for granting a variance. We agree with the City and the lower court that the ordinance is not void for vagueness and accordingly affirm the district court's decision on this issue.

V. Violation of Tennessee Code

The Plaintiff's final argument is that the provisions of the ordinance prohibiting reconstruction of a nonconforming sign in conformity with height and area limitations violate section 13-7-208(d) of the Tennessee Code, which prohibits municipalities from altering preexisting zoning restrictions. This issue is not ripe for appeal. Facially, the ordinance does not appear to violate section 13-7-208(d), which deals with the demolition of buildings formerly in conformance and their reconstruction under new zoning regulations. Tennessee courts, however, have held that the provisions of the statute apply to billboards

businesses. *Creative Displays, Inc. v. City of Pigeon Forge*, 576 S.W. 2d 356 (Tenn. Ct. App. 1978). As the magistrate indicated, if at some future date Outdoor loses, by act of God or non-renewal of a lease, a billboard site and cannot either reconstruct it in a conforming manner or obtain a variance to except it from the ordinance, then it may have a case to present. As it currently stands, however, Outdoor may either purchase existing, conforming signs or build new signs in conformance with the ordinance, should the old be destroyed. We are therefore convinced that the district court appropriately denied summary judgment to Outdoor on this issue.

VI.

Based upon the foregoing, we affirm the district court's denial of summary judgment to Outdoor, and uphold the court's severance of the unconstitutional sections of the ordinance from those remaining, granting full effect to the resultant ordinance.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

OUTDOOR COMMUNICATIONS, INC.,	)	No. 3-90-0231
Plaintiff,	)	Judge Echols
v.	)	
CITY OF MURFREESBORO,	)	
Defendant.	)	

ORDER

Presently pending before this Court are the parties' cross-motions for summary judgment. The Court referred the motions to the Magistrate Judge who has submitted his Report and Recommendation ("R & R") thereon. Both Plaintiff and Defendant have objected to the R & R. For the reasons more fully outlined in the accompanying Memorandum Opinion contemporaneously entered herewith, the Magistrate Judge's Report and Recommendation is hereby ADOPTED as MODIFIED.

Accordingly, Plaintiff's Motion for Summary Judgment is GRANTED, and this Court finds that Sections 7(Z), 7(L), 6(B)(1), 6(B)(2), 6(B)(4), 6(B)(5), 6(B)(6), 6(B)(7), 6(B)(9), 6(B)(12), and 3(C)(5) of Murfreesboro's sign ordinance violate the First Amendment to the Constitution. These Sections are hereby severed from the sign ordinance. Defendant's Motion for Summary Judgment is

GRANTED as to the remainder of the sign ordinance, and the remaining provisions will be given effect.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

OUTDOOR COMMUNICATIONS, INC., Plaintiff,	)	No. 3-90-0231 Judge Echols
v.	)	
CITY OF MURFREESBORO, Defendant.	)	

MEMORANDUM

Presently pending before the Court are the parties' cross-motions for summary judgment. The Court referred the motions to the Magistrate Judge who has submitted his Report and Recommendation ("R & R"). Both Plaintiff and Defendant have objected to the R & R. For the reasons outlined herein, the Court ADOPTS the Magistrate Judge's R & R, except as MODIFIED herein.

In reviewing a Magistrate Judge's Report and Recommendation, this Court is required to make a *de novo* determination upon the entire record before it. Fed. R. Civ. P. 72(b). "The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions." *Id.*

Plaintiff, Outdoor Communications, Inc. ("OCI"), is in the business of outdoor advertising. It owns several off-site billboard signs located in Murfreesboro, Tennessee. Murfreesboro recently enacted a sign ordinance for the purpose of regulating outdoor signs in the City. OCI

subsequently brought this suit against Murfreesboro, challenging several aspects of the statute as violative of the First Amendment, the Sherman Antitrust Act (15 U.S.C. §§ 1, 2 (Supp. 1991)), and Tenn. Code Ann. § 13-7-208(d) (1987 & Supp. 1993). Both parties have filed Motions for Summary Judgment on these issues.

In ruling on a motion for summary judgment, this Court must construe the evidence produced in the light most favorable to the non-moving party, drawing all justifiable inferences in his or her favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party may obtain summary judgment if the evidentiary material on file shows "that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of satisfying the court that the standards of Rule 56 have been met. *See Martin v. Kelley*, 803 F.2d 236, 239 n.4 (6th Cir. 1986). The ultimate question to be addressed is whether there exists any genuine issue of material fact which is disputed. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. If so, summary judgment dismissal is inappropriate.

Basically, Murfreesboro's ordinance places certain size, height and location restrictions on off-site signs, as well regulating the size, height, location and number of on-site signs per lot.[1] Specifically, the ordinance restricts

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[1] Section 2(35) defines "[a]n off-site sign [a]s a sign- . . . which directs attention to a business, profession, commodity, service or entertainment, which is not primarily conducted, sold or offered upon the same lot of record." Section 2(36) defines "[a]n on-site sign . . . [a]s a sign which directs attention to a

the building of new off-site signs to areas contiguous to the interstate highway. These signs must be a prescribed distance from the highway, from any interchange or intersection and from any other sign. Murfreesboro City Code, Chapter 25-1/4, § 10 (1990). The ordinance specifically provides that any sign (on-site or off-site) erected pursuant to the ordinance may display either commercial or noncommercial messages. *Id.* at §§ 7(AA), 9(D), 10(B). Existing nonconforming signs may be maintained, as long as they are not altered to create an additional nonconformity. A non-conforming sign cannot be moved to a different property or to a different place on the same property unless it is brought into conformity with the ordinance. *Id.* at § 12. In order to erect either an on-site or off-site sign, the sign's owner must obtain a sign permit from the City. *Id.* at § 3. To receive a such permit, the owner must comply with the appropriate restrictions and pay a permit fee. *Id.* However, owners of certain types of signs are exempt from obtaining a sign permit and from paying the fee, although they must still comply with the other applicable provisions of the ordinance, such as size, height or location requirements. *Id.* The following types of signs are exempt from the sign permit and permit fee requirements:

> (1) American, State, City, County flags; (2) Address Signs (street number); (3) Banners; (4)

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business, profession, commodity, service or entertainment, which is primarily conducted, sold or offered upon the same lot of record."

> Convenience Signs;[2] (5) Governmental Signs;[3] (6) Holiday decorations;[4] (7) Name and/or Address Plaques; (8) Pennants; (9) Scoreboard and ball field fence signs located inside athletic fields owned by a government entity; (10) Non-commercial permanent signs not exceeding four and one-half (4 1/2) square feet in surface area; (11) Signs on the inside of windows; (12) Signs painted on the outside glass surfaces of windows or doors and indicating name, address and hours of the lawful business conducted therein, provided such signs do not cover more than fifteen (15) per cent of the total window area to which it is applied[, except as prohibited in Section 7]; (13) Streamers; (14) Temporary Signs, except inflatable and portable signs; [and] (15) Vehicle Signs, except as prohibited in Section 7.

Id. at § 6(B). Another exemption is created by § 3(C)(5), which provides that "[a]ny tax exempt organization pursuant to Section 501(c)(3), (4), or (5) [of the] Internal Revenue Code, shall be required to obtain a permit but no permit fee shall be required."

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[2] A "convenience sign," as defined by § 2(11), is "[a] sign not exceeding four and one half (4 1/2) square feet in surface area displayed strictly for the direction, safety and convenience of the public, such as signs which identify rest rooms, parking area entrances and exits, freight entrances and exits."

[3] Section 2(21) defines a governmental sign as "[a] sign erected and maintained by or for the federal, state or local government or agency thereof."

[4] "Holiday decorations" are defined, in § 2(24), as "[t]emporary decorations, not including signs, clearly incidental to, and customarily and commonly associated with any national or local holiday."

Section 7 prohibits signs containing certain categories of subject matter, such as signs which contain false, misleading or deceptive information, signs which promote, or are related to, illegal activity, and signs which display pornography.

The ordinance provides sign owners with an opportunity to be heard if they think that the ordinance is unduly burdensome (§ 12(F)) or if they believe that they are entitled to a variance (§ 15).

Plaintiff contends that the ordinance violates the First Amendment because it results in a complete elimination of off-site signs, prefers commercial over noncommercial speech, impermissibly discriminates among different categories of noncommercial speech and is vague and overbroad. The Magistrate Judge concluded that only four portions of the ordinance (§ 6(B)(1), § 6(B) (5), § 7(L) and § 7(Z)) violate the First Amendment; the Magistrate rejected the Plaintiff's other First Amendment claims. In addition, the Plaintiff claims that the ordinance violates the Sherman Antitrust Act (15 U.S.C. §§ 1, 2 (Supp. 1991)) and Tenn. Code Ann. § 13-7-208(d) (1987 & Supp. 1993). The Magistrate rejected these claims as well. This Court ADOPTS the Report & Recommendation of the Magistrate Judge. However, because this Court finds that additional portions of Murfreesboro's statute are violative of the First Amendment, the Magistrate's Report and Recommendation is MODIFIED as provided below.

The Supreme Court has held that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v.*

Mosley, 408 U.S. 92, 95 (1972). However, a restriction on the time, place, and manner of speech is permissible if it advances a significant governmental interest, is content neutral, and leaves open ample alternative channels for communication of the information. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 515-16 (1981).

Murfreesboro's ordinance contains several content neutral restrictions regulating the size, height and location of signs. However, OCI challenges the ordinance's exemptions as being content based, rather than content neutral. The Magistrate concluded that two of the exemptions, that for flags and that for government signs, violate the First Amendment. This Court agrees with the Magistrate's conclusion, but finds other exemptions unconstitutional as well.

The Supreme Court has held that noncommercial speech enjoys a greater degree of protection than commercial speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-63 (1980). *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council. Inc.*, 425 U.S. 748 (1976). While a "city may distinguish between the relative value of different categories of commercial speech, [it] does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514 (1981). In that case, San Diego had enacted an ordinance banning all off-site signs and permitting only on-site commercial signs. San Diego excepted certain

types of signs from the ban,[5] just as Murfreesboro has excepted certain sign owners from the fee and permit requirements. Included in San Diego's exceptions were "government signs; signs located at public bus stops; . . . commemorative historical plaques; religious symbols; . . . [and] approved temporary, off-premises, subdivision directional signs." *Id.* at 494-95. Holding the statute's exemptions unconstitutional, the plurality said, "[w]ith respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: 'to allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.' " *Id.* at 515 (quoting *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 538 (1980)). *Accord Nat'l Advertising Co. v. Orange*, 861 F.2d 246, 248-49 (9th Cir. 1988) (holding unconstitutional an ordinance which exempted government signs, government flags and convenience signs from a general ban on off-site signs); *Matthews v. Needham*, 764 F.2d 58, 59 (1st Cir. 1985) (holding unconstitutional an ordinance which prohibited virtually all off-site signs, allowed only on-site commercial signs, and exempted "signs denoting the name and/or profession of the owner or occupant of [a] building and temporary signs erected for a charitable cause"); *Nat'l Advertising Co. v. Babylon*, 703 F.Supp. 228, 239 (E.D.N.Y. 1989), *aff'd*, 970 F.2d 895 (2d Cir. 1992)

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[5] In *Metromedia*, certain types of signs were exempted from the outright ban on off-site signs, whereas Murfreesboro has exempted certain signs from the payment of the permit fee. In both cases, the result was to prefer certain types of speech by making it easier for certain speakers to communicate their views.

(ordinances which "create[d] exceptions to their general bans on non-commercial speech . . . discriminate[d] in favor of certain types of non-commercial speech and against other types of non-commercial speech" and therefore were held unconstitutional). *See also Gilleo v. Ladue*, 986 F.2d 1180 (8th Cir. 1993), *cert. granted*, 114 S.Ct. 55 (Oct. 4, 1993).

In addition to its exemptions for government flags and signs (§ 6(b)(1) AND (5)), the ordinance also exempts address (street number) signs (§ 6(B)(2)); "convenience" signs (signs erected for the direction, safety and convenience of the public) (§ 6(B)(4)); holiday decorations (§ 6(B)(6)); and name and/or address plaques (§ 6(B)(7)).

The City, by exempting owners of these kinds of signs from the permit and fee requirements, has made it easier for certain noncommercial speakers to convey their messages than for others. In essence, the City is saying that the display of government flags and signs, address signs, convenience signs, name and address plaques, and holiday decorations has more value than do other kinds of noncommercial speech. The First Amendment does not permit the City to make such preferences. *See Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514 (1981). Therefore, §§ 6(B) (2), 6(B)(4), 6(B)(6), and 6(B) (7) also are unconstitutional.[6]

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[6] Although this Court has found the content-specific exemptions for name and/or address signs/plaques and for convenience signs unconstitutional, the Court points out that name and/or address signs or plaques and some convenience signs may still enjoy exemption under § 6(B)(10), which exempts permanent noncommercial signs that are smaller than four and

However, a city may place content neutral restrictions on the time, place and manner of speech, as long as its restrictions advance a significant governmental interest and leave open ample alternative channels for communication of the information. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). For example, in the interest of traffic safety, a city may restrict the size, illumination, design, location or quantity of signs.

Therefore, the exemption in 6(B)(10) for permanent noncommercial signs that are smaller than four and one half (4 1/2) square feet in surface area is permissible. This exemption embodies two preferences. The first is a preference for noncommercial over commercial speech. Such a preference is acceptable, because noncommercial speech is entitled to greater First Amendment protection than is commercial speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-63 (1980). *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). This exemption, however, does not prefer certain types of noncommercial speech over other kinds of noncommercial speech, a preference which is prohibited by the First Amendment. *See Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514 (1981). The second preference expressed in § 6(B)(10) is a preference for signs that are smaller than four and one half square feet.

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one half square feet in surface area. Therefore, those signs which meet the time, place, and manner restrictions of § 6(B)(10) may still be exempt pursuant to that content neutral (and therefore constitutional) exemption.

Such a preference is based purely on the size of the sign, not on its content, and therefore is constitutional.

Likewise, the Court determines that the ordinance's exemptions for banners (§ 6(B) (3)), pennants (§ 6(B)(8)), signs on the inside of windows (§ 6(B)(11)), streamers (§ 6(B)(13)), temporary signs (§ 6(B)(14)) and vehicle signs (§ 6(B)(15)) are constitutional, because they are content neutral exemptions. These sign exemptions are based, not on what the sign says, but on the kind of sign and the location of the sign.

A number of the signs which Murfreesboro has exempted under § 6(B) are commercial in nature. For example, § 6(B)(12) exempts "[s]igns painted on the outside glass surfaces of windows or doors and indicating [the] name, address and hours of the lawful business conducted therein." Clearly, this exemption is directed at business owners and professionals who wish to advertise their businesses. Section 6(B)(9) exempts "[s]coreboard and ball field fence signs located inside athletic fields owned by a government entity." The signs most commonly found inside athletic fields are advertising signs, which are commercial in nature. Assuming that such signs are used for advertising, the exemptions in §§ 6(B)(12) and 6(B)(9) represent a preference for commercial speech over noncommercial speech. *See Metromedia, Inc. v. San Diego* 453 U.S. 490, 512-13 (1981). Accordingly, this Court finds that § 6(B)(12) violates the First Amendment, as does § 6(B)(9) where the signs inside athletic fields are used for commercial advertising.

Section 3(C)(5) exempts tax exempt organizations from the payment of a permit fee. By excepting certain

noncommercial speakers from the fee requirement "a town is making a value-based judgment" that one type of noncommercial speech is more important than another. *Nat'l Advertising Co. v. Babylon*, 703 F. Supp. 228, 239 (E.D.N.Y. 1989), *aff'd*, 970 F.2d 895 (2d Cir. 1992). In *Babylon*, the challenged ordinances exempted from their ban "signs advertising annual or semiannual event[s] of a nonprofit organization," temporary "illuminated announcement sign[s] . . . when erected or maintained by a public or semi-public agency, eleemosynary organization or permitted club," and "signs identifying a grand opening, parade, festival, fund drive or similar occasion." *Id.* at 239. The court held that the granting of exceptions for signs erected by such entities "shows an impermissible favoritism for certain types of non-commercial speech and certain types of speakers and, additionally, leaves open the door to abuse of discretion in determinations of who qualifies for the exception." *Id.* Because § 3(C)(5) of Murfreesboro's ordinance favors certain noncommercial speakers over others, it too is impermissible under the First Amendment.

The City of Murfreesboro also objects to the Magistrate Judge's recommendation that the ordinance's exemption for government signs violates the First Amendment. The City cites several Tennessee Supreme Court cases which stand for the proposition that "a state, or political subdivision thereof, is not subject to a statute unless specifically mentioned therein or unless application thereto is necessarily implied." *Keeble v. Alcoa*, 319 S.W.2d 249, 250 (Tenn. 1958). *Accord Amer. Can Co. v. McCanless*, 193 S.W.2d 86 (Tenn. 1946); *Davidson County v.*

Harmon, 292 S.W.2d 777 (Tenn. 1956). However, this general principal of law is restricted by the First Amendment to the United States Constitution. By enacting the "government sign" exemption, Murfreesboro is preferring its own speech (commercial or noncommercial) over that of other noncommercial speakers. As stated previously, the First Amendment does not permit such a preference. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). For these reasons, the Court adopts the Magistrate Judge's recommendation and finds that the "government sign" exemption is unconstitutional.

Having determined that portions of the ordinance are unconstitutional, this Court must now determine whether to strike down the entire ordinance or to sever the unconstitutional sections, leaving the remainder in effect. The Magistrate Judge recommended severance. Section 18 of the ordinance contains a severability clause which provides:

> "[i]f any section, clause, provision or portion of this ordinance is held to be invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect any other section, clause, provision or portion of this ordinance which is not of itself invalid or unconstitutional."

The Supreme Court has held that "[s]everability of a local ordinance is a question of state law." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988). In Tennessee, the doctrine of elision is well-established. *Moore v. Fowinkle*, 512 F.2d 629, 631 (6th Cir. 1975); *Mayor of Fayetteville v. Wilson*, 367 S.W.2d 772 (Tenn. 1963). That doctrine provides that

> [w]hen a statute contains one or more unconstitutional provisions, the obnoxious provisions will be eliminated and the statute sustained as to the rest, unless the invalid provisions are deemed so essential, and are so interwoven with others, that it cannot reasonably be presumed that the legislature intended the statute to operate otherwise than as a whole. Where an invalid provision is incidental and subordinate and can be stricken without impairing the efficacy of the act, this will be done.

Moore v. Fowinkle, 512 F.2d at 632 (citation omitted). In attempting to determine legislative intent, a court should take into account the existence of a severability clause. "If possible, it is the duty of the courts to give effect to a severability clause and to make an elision, so as not to invalidate an entire act." *Id.* at 632.

It is clear that the Murfreesboro City Council intended that any unconstitutional portions of this ordinance be severed and the remainder of the ordinance be left in effect. The portions which are unconstitutional are incidental to the ordinance, and after their deletion, an operative law will still remain. Therefore, the following unconstitutional sections will be severed from Murfreesboro's sign ordinance: §§ 7(L), 7(Z), 6(B)(1), 6(B)(2), 6(B)(4), 6(B)(5), 6(B)(6), 6(B)(7), 6(B)(9), 6(B)(12), and 3(C)(5). Defendant's Motion for Summary Judgment is GRANTED as to the remainder of the sign ordinance, and the remaining provisions will be given effect.

For the foregoing reasons, the findings and conclusions of the Magistrate Judge's Report and Recommendation are hereby ADOPTED, except as MODIFIED herein.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

OUTDOOR COMMUNICATIONS, INC.	)	No. 3:90-0231
v.	)	
CITY OF MURFREESBORO	)	

TO: Honorable Robert L. Echols, District Judge

REPORT AND RECOMMENDATION

The above captioned action was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) for consideration of the plaintiff's motion for summary judgment filed April 30, 1991, Docket Entry No. 47, and defendant's cross motion for summary judgment filed September 9, 1991, Docket Entry No. 72. *See* Referral Orders entered May 31, 1991 and August 9, 1991.

Plaintiff Outdoor Communications, Inc. ["OCI"], is engaged in the outdoor advertising business. OCI owns several off-site signs known as billboards in the City of Murfreesboro, Tennessee. Plaintiff's billboards are permanent structures located on private property. The billboards display commercial as well as non-commercial messages. Plaintiff alleges that it desires to construct new billboards within the City, and to replace or relocate existing billboards if the property on which the sign was located is developed or sold or otherwise rendered unusable for billboards.

In March 1990, plaintiff filed this lawsuit attacking the 1985 Murfreesboro ordinance restricting billboards within the City as violative of the First Amendment to the U.S. Constitution as applied to the states through the Fourteenth Amendment. The City repealed the 1985 ordinance in August 1990, and enacted a new ordinance. OCI was subsequently granted leave to amend its complaint to challenge the new ordinance, and the challenge to the old ordinance was settled. Part of the settlement agreement was that the Court entered an Order declaring the 1985 ordinance unconstitutional and void. *See* Order entered October 31, 1990, Docket Entry No. 19.

By its amended complaint, plaintiff now attacks the 1990 ordinance as violative of the First Amendment, the Sherman Antitrust Act (15 U.S.C. § 2), and T.C.A. § 13-7-208(d). Plaintiff moves for summary judgment on these claims as does defendant. (The 1990 Murfreesboro sign ordinance is located at Docket Entry No. 74, filed September 9, 1991.)

The City enacted the ordinance for the purposes of promoting aesthetics, protecting the environment, enhancing the local economy by promoting a more effective display of signs, and restricting signs which increase the probability of traffic accidents by distracting drivers or obstructing their vision [Section 1 of Ordinance].

The ordinance restricts new off-site signs to the area contiguous to the interstate highway. The off-site signs must be within a certain distance of the highway, and must be at least 1,000 feet from each other, and 1,000 feet from an interchange or an intersection.

An off-site sign is a sign which advertises a product or service not related to the lot of record. On-site business identification signs are allowed, but restricted by size, height and number.

All signs, off-site and on-site, require a permit unless they fall into a specifically exempt category. Signs exempt from permit and permit fee include American, state, city and county flags, address signs, banners, convenience signs, governmental signs, holiday decorations, name and/or address plaques, pennants, scoreboard and ball-field fence signs, streamers and vehicle signs [Section 6b]. Also exempt are signs directing the public to a special event [Section 8b], and non-commercial permanent signs not exceeding four-and-a-half square feet, and signs on the inside or outside of windows, and temporary signs except inflatable and portable signs [Section 6b].

Tax exempt organizations (as defined by the Internal Revenue Code), are relieved from permit fee obligations, [Section 3(C)(5)], as are any signs erected or maintained by or for the federal, state or local government [see Section 6(B)(5) and Section 2(21)]. These latter signs are also exempt from the permitting requirements.

The ordinance also forbids certain categories of subject matter outright in Section 7. These include pornography. Pornography is not defined in the definitional section of the Ordinance [Section 2], although the definitional section references Webster's *Ninth Collegiate Dictionary* for all undefined terms. Also forbidden are signs which promote or are related to illegal activity.

Existing non-conforming signs are unaffected if they are retained as is. Section 12 governs any changes made

in existing, non-conforming signs. A non-conforming sign may not be altered so as to create an additional non-conformity or increase the extent of the existing non-conformity. Nor can it be removed and replaced at a different property without conforming to the sign ordinance. It can only be replaced at a different location on the same lot of record if it conforms to specified height and size area limits. If the sign owner believes that these height and area limits are unduly restrictive, the owner is entitled to a public hearing before the City Council [Section 12-1(f)]. It is then within the City Council's discretion to grant or deny the sign owner an exemption from the height and size requirements for relocating a sign on the same lot of record.

The Board of Zoning Appeals may grant a variance from any provision of the ordinance as it determines appropriate [Section 15-2].

The Ordinance contains several so-called "savings clauses" which provide that "nothing in this section shall be construed to limit or curtail non-commercial speech in favor of commercial speech." *See*, e.g., Section 9(D), 10(B).

The ordinance has a severability clause at Section 18 providing that if any section of the ordinance is held invalid or unconstitutional this holding will not affect the other portions of the ordinance.

Plaintiff presently maintains and operates 44 billboards in the City. Louie E. Akins, Jr., Division Manager for the plaintiff, including the plaintiff's area within Murfreesboro, attests that the restrictions in the ordinance will result in inability of a private company to erect new

billboards. And, OCI contends that almost all of its off-site signs are non-conforming.

Presently there is only one interstate highway within the City limits of Murfreesboro, approximately five miles of I-24. Chief building official for the City of Murfreesboro, Betts M. Barbier, attests that he has learned that there is planned construction of an additional interstate highway through Murfreesboro, Interstate 840. Furthermore, the City of Murfreesboro is considering annexing additional territory. There is no proof as to whether these changes will actually result in additional sites available for billboards or, if so, when.

The City of Murfreesboro is served by the two daily Nashville newspapers, a weekly Rutherford County paper, and a daily local paper, the *Daily News Journal*. Furthermore, it is served by at least five broadcast commercial stations, and a cable television system.

FIRST AMENDMENT

Plaintiff argues that the sign ordinance violates the First Amendment because it results in a complete elimination of off-site signs; prefers commercial over non-commercial speech; impermissibly discriminates among different categories of non-commercial speech; and is vague and over-broad.

Curtailment of Off-Site Signs

Plaintiff argues that the ordinance is unconstitutional because the effect of it is to prohibit private billboard

companies from constructing new billboards in Murfreesboro, and the Ordinance limits the companies' rights to replace non-conforming signs. Thus, all off-site signs may eventually be eliminated due to attrition of available locations.

The City points out that OCI is not denied the opportunity to operate its advertising business because it retains the right to maintain and operate its 44 currently operated off-site signs at their present locations provided that they do not fall into one of the prohibited categories in Section 7 of the ordinance.[1] Furthermore, the City points out that OCI retains the right to purchase other legal non-conforming signs from their present owners.

The City concedes that OCI may lose its right to use its 44 sites by other means, i.e., a landowner's termination of OCI's lease, but the City argues that the First Amendment does not require it to insulate the plaintiff from the economic realities of competing in the real estate market. And, the City points out that there is potential for the City to acquire more territory or more highway space, resulting in additional available billboard sites.

It is clear under present First Amendment principles, outlined by the Sixth Circuit in two recent billboard cases, that most of the restrictions placed on OCI's right to maintain and operate off-site billboards comply with the First Amendment. The Supreme Court has decided one billboard case, but it is particularly confusing due to

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[1] The validity of the exceptions challenged by OCI in Section 7 will be discussed later.

the issuance of five opinions, none commanding a majority. The case does effectively juxtapose the competing views on the merits of billboards, however.

As former Chief Justice Warren Burger noted,

> Every large billboard adversely affects the environment, for each destroys a unique perspective on the landscape, and adds to the visual pollution of the city. Pollution is not limited to the air we breathe and water we drink; it can equally offend the eye and the ear.

Metromedia, Inc. v. San Diego, 453 U.S. 490, 560-61 (1981) (Burger, Chief J. dissenting). On the other hand,

> The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or "broadside" to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes.

453 U.S. at 490 (White, Jr., plurality opinion), quoting Opinion below, 26 Cal. 3d. at 888, 610 P.2d at 430-431 (Clark, J., dissenting).

Despite the fragmented opinions in *Metromedia,* all the Justices agreed that the legislative goals of promoting traffic safety and preserving scenic beauty are substantial, and thus, regulation of billboards is a legitimate exercise of a municipality's police power. 453 U.S. at 507-08 (White, J. plurality opinion); 453 U.S. at 528 (Brennan, J. concurring in judgment); 453 U.S. at 550 (Stevens, J. dissenting); 453 U.S. at 560-61 (Burger, C.J. dissenting); 453 U.S. at 570 (Rehnquist, J. dissenting).

However, the Court in *Metromedia* was hopelessly splintered as to the measures a city can permissibly take to further its goals by restricting billboards. As Justice Rehnquist noted, "the court's treatment of the subject [is] a virtual tower of Babel, from which no definitive principles can be clearly drawn." 453 U.S. at 569.

Metromedia was filed by several companies engaged in outdoor advertising business seeking to enjoin the enforcement of a San Diego ordinance severely restricting outdoor advertising displays. The ordinance at issue banned off-site commercial and non-commercial billboards unless permitted by one of several specified exceptions. The ordinance allowed on-site displays. The plurality consisting of four Justices held that the ordinance was unconstitutional because it impermissibly distinguished between permissible and impermissible signs be reference to their content. The concurring opinion was filed by two Justices joining in the judgment on the grounds that a total ban of outdoor advertising was invalid. Three Justices authoring separate dissenting opinions expressed the view that a total ban on billboards would be permissible. At any rate, the resulting precedential effect of the splintered opinions was an invalidation of the San Diego ordinance based on its "impermissible content based restriction on non-commercial speech because it only permitted on-site signs with certain types of speech." *Discovery Network v. City of Cincinnati*, 946 F.2d 464, 470, n. 9 (6th Cir. 1991) *cert. granted*, 112 S.Ct. 1290, citing *Metromedia*, 453 U.S. at 521.

The Sixth Circuit has recently expressed its own disagreement with the *Metromedia* plurality dicta that the ordinance permissibly regulated commercial speech by

banning it outright. *Id.*, 946 F.2d at 470, n. 9. The Sixth Circuit noted that it was free to disregard this dicta because it did not command a majority of the Court, and was not necessary to the judgment resulting in invalidation of the ordinance. *Id.*

The Sixth Circuit endorses the *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), test used to evaluate restrictions on commercial speech. "[A] government regulation will be upheld if it (1) regulates commercial speech; (2) promotes a substantial governmental interest; (3) directly advances an interest; and (4) is not more extensive in its regulation of that speech than is necessary to serve that interest." *Discovery Network*, 946 F.2d at 467. The Sixth Circuit noted that other than *Metromedia*, the Supreme Court has never upheld a regulation on commercial speech that burdens the speech for reasons unrelated to curbing the adverse effects stemming from the speech itself rather than the method of conveying the speech. *Id.*, at 469-470.

> In every commercial speech case but one, [*Metromedia*] a regulation upheld as constitutional by the Court fell into one of two groups. In the first, the regulation sought to ban speech believed to be inherently false or misleading. In the second group, the regulation sought to alleviate distinct adverse effects allegedly caused by and directly flowing from the type of commercial speech regulated.

Id., at 470.

Although commercial speech is not afforded as much protection as non-commercial speech, it is still extremely important to public welfare, especialiy because of its role

in fostering private economic activity. *Id.*, at 468-69. Unless the commercial speech is inherently false or misleading, it is accorded a high value under the First Amendment. *Id.*, at 471. *Discovery Network* analyzed the City of Cincinnati's ordinance banning newsracks on the public sidewalks for distributors of commercial handbills. Like in *Discovery Network*, the speech that the City of Murfreesboro ordinance is attempting to regulate is not "inherently false or misleading." The City of Murfreesboro "is attempting to place a burden on a particular type of speech because of harms caused by the manner of delivering that speech" and thus the Court must review the regulation with "special care." *Discovery Network*, at 471, quoting *Central Hudson*, 447 U.S. at 566, n. 9.

In *Discovery Network*, the Court found that the restriction at issue was not adequately tailored to serve the governmental interest. The City was concerned about the aesthetic and safety effects of having a variety of newsracks on street corners due to the non-uniform design and color schemes of the racks, and the proximity of the racks to busy streets and the potential for rust on City fixtures caused by chains attaching the newsracks to fixtures. The Court found that there was not a reasonable fit between the ends and means because the solution in the ordinance of banning the newsracks altogether was overbroad. The Court noted that the City of Cincinnati had many less restrictive options to meet its goals, such as banning the use of chains, setting color and design regulations on all newsracks, and caps on the number of newsracks. 946 F.2d at 472. The Court was also very disturbed by the City's treatment of newsracks with commercial publications differently from other newsracks.

The Court held that the City had not justified a regulation not content neutral. *Id.*, at 473.

A three-part test substantially similar to the *Central Hudson Gas* test is used by the Sixth Circuit to evaluate time, place and manner restrictions on billboards.

> Such restrictions are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a substantial governmental interest, and they leave open ample alternative channels for communication of the information.

Wheeler v. Commissioner of Highways, 822 F.2d 586, 589 (6th Cir. 1987); *see also Rzadkowolski v. Village of Lake Orion*, 845 F.2d 653, 654 (6th Cir. 1988).

Although our Court of Appeals would not appear to tolerate a complete ban on billboards, it has used this test to uphold laws severely curtailing billboards. I do not think that the degree of curtailment found in the Murfreesboro law violates the First Amendment. Certain aspect of the ordinance have content-neutrality problems, and this will be discussed *infra*. However, I am convinced that the Murfreesboro ordinance meets the second and third *Wheeler* criteria in that it is narrowly tailored to serve a substantial city interest, and it leaves open ample alternative information communication channels.

In *Rzadkowolski v. Village of Lake Orion, supra*, the Court upheld the constitutionality of a village ordinance banning off-site billboards in all locations except for the industrial area of town. The results of size, distance and zoning restrictions was the allowance of only one billboard in the village, located only in the industrial district.

845 F.2d, at 654. The plaintiff, a sign company, challenged the ordinance on the grounds that it unconstitutionally restricted its ability to put a billboard wherever he wanted to, and also because it made unconstitutional distinctions between different types of speech. The ordinance permitted on-premises signs relating to the activity conducted on the premises. The plaintiff challenged this as unduly favoring commercial speech over non-commercial speech because few establishments conduct noncommercial activity. Thus, the practical effect of the ordinance was to prohibit non-commercial speech. Furthermore, the plaintiff challenged the content neutrality of the ordinance because it permitted temporary signs carrying a political message. *Id.*, at 654.

The Sixth Circuit held that the ordinance withstood the plaintiff's First Amendment attack. The Court held that the billboard requirements did not regulate the content of speech; were tailored to serve "significant governmental interests," and apparently preserved "alternative channels for communicating information." *Id.*

Murfreesboro clearly has significant governmental interests in attempting to improve the aesthetics of the City, and in promoting safety. Furthermore, in my opinion, the restrictions at issue are well tailored to serve these interests. Murfreesboro is allowing billboards on the highway, and allowing on-site signs subject to manner restriction, and, significantly, existing non-conforming signs are allowed to exist, although they are subject to restrictions if they are altered or moved. It is true that in *Rzadkowolski* the Court made much to do about the fact

that the Village of Lake Orion is "very small," and primarily zoned for residential use. By contrast, Murfreesboro is a small city rather than a village, and contains a good mix of residential, industrial and commercial properties. But, by allowing some billboards to remain, Murfreesboro is considering the economic interests of its commercial residents, including the plaintiffs, and the need for local consumers to be educated about whatever might be on the signs. Furthermore, allowing some billboards on the highway is sufficient to alert the attention of passersby to the attractions in Murfreesboro, and also is an additional means of reaching locals on their way in and out of town. And, of course, the on-site signs serve the mutual needs of businesses and clients in a direct manner.

There is no problem in Murfreesboro with alternative channels for communicating information. The unrebutted proof is that Murfreesboro is well-served by the print and television media. To the extent that billboards are a unique means of conveying information some are still allowed.

Preference for Commercial Over-Non-Commercial Speech

Another problem raised by plaintiff is that the Murfreesboro ordinance impermissibly prefers commercial speech over non-commercial speech. This concern is without merit. The *Rzadkowolski* Court held that the Village of Lake Orion ordinance did not impermissibly favor commercial speech over non-commercial by allowing signs relating to on-premises activities subject to size and

distance restrictions. The Court noted that the single billboard within the industrial district was permitted to display non-commercial advertising subject only to size and distance restrictions. 845 F.2d at 655.

Restrictions on off-site signs vis-a-vis on-site signs are not impermissible because of the fact that most on-site signs are commercial.

> [T]he on-premises/off-premises distinction does not constitute an impermissible regulation of content just because the determination of whether a sign is permitted at a given location is a function of the sign's message. [The state] by allowing persons who own or lease property to have a sign . . . advertising an activity conducted on the property is not favoring one message over another. The state has simply recognized that the right to advertise an activity conducted on the site is inherent in the ownership or lease of the property.

Wheeler v. Commissioner of Highways, 822 F.2d 586, 591 (6th Cir. 1987). This principle was also used to sustain the Village of Lake Orion's ordinance. 845 F.2d at 655.

In short, acts that severely restrict billboards to certain zoning areas and permit only on-premises signs in other areas do not offend the First Amendment.

Distinctions Between Types of Non-commercial Speech

The ordinance at issue in *Metromedia* exempted these categories of speech from the billboard prohibition:

> [G]overnment signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising

> purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature and news; approved temporary off-premises, subdivision directional signs; and temporary political campaign signs.

453 U.S. at 494-95. The plurality opinion did not go far in explaining which of these categories were not content neutral and why. It merely reiterated the standard that,

> . . . time, place and manner restrictions are permissible if they are justified without reference to the content of the regulated speech [ ] serve a significant governmental interest and leave open ample alternative channels for communication of information.

453 U.S. at 516 (citation omitted).

The Court went on to state, "it is apparent . . . that the ordinance distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content." 453 U.S. at 516. The Court discussed as examples that San Diego favors certain kinds of messages, such as on-site commercial advertising, and temporary political campaign advertisements. *Id.*, at 519. The Court stated "the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of the public discussion of an entire topic." *Id.*, at 519, quoting *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 537.

Plaintiff argues that the Murfreesboro ordinance impermissibly discriminates among different categories

of non-commercial speech and speakers. In particular, Section 6(B) lists categories of signs which are exempt from permits and/or permit fee requirements. American, state, city and county flags, holiday decorations, and scoreboard and ballfield fence signs are exempt from permits and permit fees. All other non-commercial messages are limited to four-and-a-half square feet of surface area in order to be exempt from permit and permit fee requirements. Convenience signs are defined as containing messages for the direction, safety and convenience of the public. They are exempt from permitting requirements, and are limited to four-and-a-half square feet in surface area. Section 2(11).

Plaintiff also points out that the ordinance discriminates on the basis of who is the speaker. Organizations exempt from taxation pursuant to Sections 501(C)(3), (4) or (5) of the Internal Revenue Code are not subject to size restrictions and need not pay a permit fee. The same is the case for government entities.

It is true that the City is discriminating by assessing the relative value of certain types of non-commercial speech over others, and of certain categories of non-profit speakers. But, the form of discrimination is mild in that the non-preferred speech and speakers are not banned (with the exception of the two categories to be discussed *infra*) but are merely forced to, in depending on the category, pay a relatively small permit fee or limit the size of their sign. This is not like the ordinance struck down in *Metromedia* which banned outright certain types of speech. Nonetheless, the City is expressing a preference, and thus it must be reviewed for content neutrality.

The City defends the exemptions of certain categories of signs from the permit requirement as a recognition of the absolute impossibility of administering regulations on small signs and signs of a temporary nature. While it is no doubt true that signs of a temporary nature are more difficult to regulate, only one portion of the ordinance is phrased in terms of temporary versus non-temporary signs. I note that flags may be either, depending on the intent of the person erecting the flag. Most portions of the ordinance list content-specific categories.

It is fairly clear to me that Murfreesboro is not attempting to regulate certain topics of speech by exempting directional signs and scoreboard and ballfield fence signs from the permitting requirements. However, it is too late in the day to argue that American flags are content neutral. *See, e.g., United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 2408 (1990) (holding that prosecution for burning flag under the Flag Protection Act of 1989 is not consistent with the First Amendment).

Plaintiff also argues that the exemption for holiday decorations is not content neutral. Plaintiff's problem with content neutrality in this regard is its assumption that the City is preferring Christmas, a religious holiday, over other holidays. Plaintiff's basis for this is that it assumes Christmas decorations are favored because the only string lighting permitted in the City is between November 15 and January 15. The City objects to plaintiff's attempt to link the holiday signs exemption with the string lighting provision. The City argues that all holiday signs are exempt, regardless of the time of year or purpose of the holiday. As the City's interpretation of its

ordinance is reasonable, there is no need to read it in the objectionable way offered by plaintiff.

The City defends the exemption for tax-exempt organizations from the permit fee as a permissible preference for the non-commercial nature of their speech. The legitimacy of preferring non-commercial speech over commercial speech that is not false or misleading appears foreclosed by *Discovery Network, supra.* But, the City advances a more legitimate argument in that it is merely encouraging the development of these non-profits in the same manner that Congress chose to do so in enacting Section 501 of the Internal Revenue Code. Thus, as the City points out, the disparate treatment of tax versus non-tax exempt entities relate solely to their tax status and not to the content of their message. I accept this justification as content-neutral. The exemption for governmental entities is not justified, however.

In sum, it is my opinion that the only categories of exemptions in 6(B) of the Murfreesboro ordinance the [sic] offend the First Amendment are the exemptions for flags and for signs erected by governmental entities.

Total Ban

Plaintiff challenges the section of the ordinance banning billboards "displaying pornographic matter," Section 7(L), and the section banning billboards, "which promote or are related to illegal activity," Section 7(Z).

Plaintiff argues that it violates the First Amendment to ban the display of pornographic material because only obscene material is exempt from the protections of the

First Amendment. Plaintiff also complains that this prohibition against displaying pornography is vague, because pornography is not defined in the ordinance. This argument fails because the ordinance explicitly makes reference to Webster's *Ninth New Collegiate Dictionary*, as the definitional source for words not defined in the ordinance. My Webster's *New Collegiate Dictionary* defines pornography with sufficient precision.[2]

> 1: The depiction of erotic behavior (as in pictures or writing) intended to cause sexual excitement. 2: Material (as books or a photograph) that depicts erotic behavior and is intended to cause sexual excitement.

The City has been unresponsive to the plaintiff's argument that a ban on pornography, assuming the word is well defined, still violates the First Amendment.

The statutory ban on display of pornography is clearly content based and, as such, will be upheld only if narrowly drawn to "accomplish a compelling government interest." *Discovery Network*, 946 F.2d at 473. Although I can conceive of circumstances where a pornographic billboard could be a serious traffic hazard, it is not for the Court to attempt to justify this regulation. The burden is on the City, and the City has not even attempted to meet

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[2] The City suggested in its brief, and at oral argument, that an appropriate source for definitions is reference to state statutes and relevant court opinions. For example, the City states in its brief that *Miller v. California*, 413 U.S. 15 (1973), provides ample guidance to those wishing for a definition of pornographic matter. I suggest that the opportunity for real confusion and impermissible vagueness occurs when persons are subject to definitions different from those provided in the ordinance.

this test. *See Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (sustaining challenge to the facial validity of an ordinance prohibiting drive-in movie theaters with screens visible from public streets from showing films containing nudity).

> [W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. (Citation omitted). Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, (Citation omitted) or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. (Citation omitted).
>
> * * *
>
> Much that we encounter offends our esthetic, if not our policital and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to "avoid further bombardment of his sensibilities simply by averting his eyes." (Citation omitted).

422 U.S. at 209-11. Absent a compelling reason tendered by the City backed up by proof, the ban on display of pornography is unconstitutional on its face.[3]

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[3] Although obscenity is not protected by the First Amendment, pornography is clearly protected by the First Amendment. *American Booksellers Association v. Hudnut*, 771 F.2d 323

The ordinance's prohibition against billboards displaying messages that promote or are related to illegal activity is also facially unconstitutional. It is clearly a content based restriction, and not justified as to non-commercial speech. The City may ban commercial speech related to illegal activity, however. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563-64 (1980).

The City attempts to defend against this argument by stating that Sections 9(D) and 10(B) of the ordinance provide that billboards displaying non-commercial messages are allowed regardless of the content of the message. A reading of these sections does not convey this, however. Both Sections 9(D) and 10(B) state,

> Nothing in this section shall be construed to limit or curtail non-commercial speech in favor of commercial speech. A person may erect a sign in conformity with this section that is used in whole or part for non-commercial speech.

These clauses specifically refer only to their own sections, not to Section 7 which bans signs related to illegal activity. Sections 9(D) and 10(B) merely provide that commercial speech shall not be favored over non-commercial speech. However, this is one category where non-commercial speech must be favored over commercial speech.

(7th Cir. 1985), affirmed 475 U.S. 1001 (1986) (sustaining challenge to ordinance banning the sale of pornographic material because it did not limit its prohibitions to material legally obscene as defined by the Supreme Court in *Miller v. California, supra*).

Accordingly, I recommend that these subsections be severed.

Void For Vagueness

Plaintiff contends that there are no standards guiding the administrative determinations of the City Council and Board of Zoning Appeals upon hearing the claims of a person seeking a variance for replacing or reconstructing non-conforming signs. These persons are entitled to a due process hearing pursuant to Section 12-1(F) of the ordinance. Persons replacing non-conforming signs at a different location on their own property must comply with the limitations set forth in Section 12-1(D), but they are entitled to a due process hearing if they believe that the regulation "unduly restricts his ability to replace, or reconstruct a non-conforming sign and that his sign is not a nuisance. . . . " Section 12-1(F). These individuals are entitled to a hearing before the City Council, but the ordinance does not set forth any standards to guide the City Council on how to make this determination.

Plaintiff also complains that Section 15-2(d) is impermissibly vague. This Section provides that the Board of Zoning Appeals may modify the application of any of the provisions of the ordinance "where there are practical difficulties or unusual hardships may result." Section 15-2(d). Once again, there are no standards in the ordinance for obtaining a variance under this provision. The Board of Zoning Appeals may decide a variance request "as it determines appropriate." Section 15-2(e).

In its response to the plaintiff's motion for summary judgment, the City asserts that the City Council may look

to T.C.A. § 13-7-208 which sets forth, *inter alia*, that non-conforming industrial, commercial or other business establishments may demolish and rebuild or expand their non-conforming uses after a zoning change "provided, that there is a reasonable amount of space for such expansion on the property . . . so as to avoid nuisances to adjoining landowners." The City asserts that this statute would guide the City Council to consider evidence concerning the non-conforming sign's affect [sic] on adjoining landowners. The City further asserts that the City Council may consider judicial precedent as to the meaning of a nuisance. The City further asserts that the Board of Zoning Appeals should look to T.C.A. § 13-7-207 which sets forth the standards for the Board of Appeals who hears claims where persons seek variances from municipal zoning regulations.

I agree with the City that the standards set forth in Section 13-7-207 are sufficiently specific to guide the Board of Zoning Appeals, and the Board is statutorily obligated to apply these standards. Furthermore, court decisions have set forth more specific criteria for the Board's decisions. *See McClurken v. Board of Zoning Appeals*, 565 S.W.2d 495 (Tenn. Ct. App. 1977). Most importantly, Section 15-2(d) sets forth the standards that the Board of Zoning Appeals must consider in whether to grant a variance. The ordinance states, in pertinent part:

> The said Board shall not grant a variance unless it makes findings based upon evidence presented it as follows: (1) The conditions upon which the petition for a variance is based would not be applicable generally to other property within the same district. (2) If the condition

> complained of by the appellant is a general or wide spread condition, then a variance shall not be permissible. Financial factors alone shall not be considered as a basis for granting a variance. (3) The alleged difficulty or hardship has not been created by any person having an interest in the property after the effective date of this ordinance. (4) The proposed variance will not increase the danger of fire or endanger the public safety.

Thus, although Section 15-2(e) states that, "[t]he Board may grant, deny, wholly or in part, or modify said variance request as it determines appropriate," there are standards guiding the Board's consideration of what is appropriate.

Due process requires that statutory prohibitions be "clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In *Grayned*, the Supreme Court assessed the alleged vagueness and overbreadth of a city ordinance prohibiting persons from "willfully mak[ing] or assist[ing] in the making of any noise or diversion which disturbs or tend to disturb the peace or good order" of school while it is in session. 408 U.S. at 107-08. The Court noted that the impermissible pitfalls of a vague statute are threefold. First of all, vague statutes do not give persons adequate warning of what is prohibited so that they may conform their conduct to the law. Second, vague statutes lend themselves to arbitrary and discriminatory enforcement. And, third, a vague statute regulating speech may chill the exercise of First Amendment rights by causing persons to steer clear from undefined boundaries. *Id.*, at 108-09.

The first and third considerations are not at issue in the instant case because the prohibitory portions of the ordinance are extremely detailed and clear. It is only the standards guiding variances that are arguably vague. The intent of the ordinance is that persons seeking to conform their First Amendment behavior to the ordinance should simply assume that they must comply with prohibitory standards unless they are able to convince the hearing boards of their unique circumstances. Persons should not proceed on the assumption that they are entitled to a variance.

However, the concerns about the dangers of arbitrary and discriminatory decisionmaking are applicable. In my opinion, the Board of Zoning Appeals' power is sufficiently circumscribed by the ordinance and by T.C.A. § 13-7-207 so as to avoid the risk of arbitrary and discriminatory decisionmaking. Furthermore, case law circumscribes the Board. Interpretations of statutes by state courts is part of the meaning of the statute and is to be considered by this Court in assessing whether the statute is impermissibly vague. *Grayned*, 408 U.S. at 110.

The call is closer as to the standards guiding the City Council in granting variances for persons, but I believe that Section 12-1(F) is not impermissibly vague. As pointed out by the City, the term "nuisance" is well defined by Tennessee case law. Furthermore, Section 12-1(F) provides by its own terms that the sign owner is also entitle [sic] to a hearing before the Board of Zoning Appeals. Thus, any deficiency in the due process hearing before the City Council can be cured by the Board of Zoning Appeals.

Sherman Anti-Trust Act

Plaintiff argues that the ordinance grants the City of Murfreesboro and other governmental entities a monopoly over the construction of new billboards in the City. Plaintiff points out that according to Section 6 of the ordinance, governmental signs are exempt from sign permit or permit fee requirements, and from the requirement that signs not be in the right-of-way. Section 2(21) defines a governmental sign as "a sign erected and maintained by or for the federal, state or local government or agency thereof."

The City urges that it is immune from federal anti-trust liability under the precepts set forth in *City of Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S.Ct. 1344 (1991), and *Parker v. Brown*, 317 U.S. 341 (1943). Plaintiff argues that the immunity principle is inapplicable here because the City is acting as a participant in the market. The City argues that this is simply not the case and that it does not have the power to act as a competitor in the billboard market.

In *City of Columbia, supra,* the Supreme Court held that the City was immune from federal anti-trust liability for passing an ordinance restricting billboard construction. 111 S.Ct. at 1356. The Court relied on *Parker v. Brown, supra,* which held that principles of federalism and state sovereignty render the Sherman Anti-Trust Act inapplicable to anti-competitive restraints imposed by the states "as an act of government." 111 S.Ct. at 1349 quoting 317 U.S. at 352. Although *Parker* discussed the immunity of a state rather than a political subdivision thereof, the immunity is applicable to a municipality where the

ordinance restricting competition is an authorized implementation of state policy. 111 S.Ct. at 1349. The Court held that South Carolina law authorized the City of Columbia to pass zoning statutes regulating size, location and spacing of billboards. *Id.*, at 1349-50. Similarly, the State of Tennessee has enabled municipalities to pass zoning laws. *See* T.C.A. § 13-7-201.

The plaintiff does not dispute this, but instead argues that the City is not immune under an exception noted in *City of Columbia*. The Court noted that *Parker* clarified that "immunity does not necessarily obtain where the state acts not in a regulatory capacity but as a commercial participant in a given market." 111 S.Ct. at 1351. The Court went on to note the example from *Union Pacific Railroad Co. v. United States*, 313 U.S. 450 (1941), where the City of Kansas City was held not immune from anti-trust liability "in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities." 111 S.Ct. at 1351.

The City of Murfreesboro's role in regulating the billboard market in the City is vastly different from the City of Kansas City's role in the produce market. The statutory scheme of the Murfreesboro ordinance is clearly a manifestation of the City's regulatory capacity rather that its participatory capacity. The City's exemption from regulation of its own signs and those of other governmental entities does not qualify as rendering the City or other governmental entities as commercial participants in the billboard market.

The parties disagree as to whether the City charter enables the City to participate in the commercial billboard enterprise or not. However, the plaintiff offers no proof whatsoever that the City considers itself wont to participate in the commercial billboard market. The City Attorney, Thomas L. Reed, Jr., does not consider the municipal charter as permitting the City to engage in the billboard industry "despite years of studying, interpreting, and applying this charter of City of Murfreesboro." Defendant's memorandum in opposition to plaintiff's motion for summary judgment filed May 28, 1991, pp. 22-23. If it comes to pass that the City utilizes the ordinance to act as a competitor in the billboard market or to allow other governmental entities to do so, the plaintiff may refile suit under the Anti-Trust Act. However, at this stage there is no genuine issue of material fact as to the City's entitlement to *City of Columbia/Parker* immunity.

Violation of T.C.A. § 13-7-208(d)[4]

OCI argues that this statute should be interpreted to mean that a sign owner has the right to replace a lost sign anywhere in the City where it was permissible to place a

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[4] Tennessee Code Annotated § 13-7-208(d) provides:
Industrial, commercial, or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto immediately preceding a change in zoning shall be allowed to destroy present facilities and reconstruct new facilities necessary to the conduct of such industry or business subsequent to the zoning change; provided, that no destruction and rebuilding shall occur which shall act to change the use classification of the land as

sign prior to the passage of 1990 statute. Plaintiff is concerned that it retains its right to have 44 signs in Murfreesboro, and that if a sign is lost due to a landowner's termination of OCI's lease or an act of God or other means of loss of territory, it can reconstruct that sign unconstrained by the new ordinance. Plaintiff also argues that Section 13-7-208(d) bars the City from characterizing a non-conforming sign as a nuisance when it is reconstructed on a different part of the same lot.

The City argues that it is not inconsistent with the State statute to require that if an entity wants to acquire a new sign, it must acquire an existing sign or go to the highway. The City further argues that it is much too strained an interpretation to read the statute as providing for the continuation of a business in operation prior to the passage of the new zoning ordinance, but which is presently a non-conforming establishment.

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classified under any zoning regulations or exceptions thereto in effect immediately prior to or subsequent to a change in the zoning of the land area on which such industry or business is located. No building permit or like permission for demolition, construction or landscaping shall be denied to an industry or business seeking to destroy and reconstruct facilities necessary to the continued conduct of the activities of that industry or business, where such conduct was permitted prior to a change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners.

The statute applies to a leasehold interest in a billboard. *Creative Displays, Inc. of Knoxville v. The City of Pigeon Forge*, 576 S.W.2d 356 (Tenn. Ct. App. 1978), *cert. denied*. By its clear terms, the statute only allows a non-conforming establishment to *continue* in operation. I think it is a strained interpretation of the statute to read it as meaning that an establishment which is destroyed either by the owner of the establishment or by some external force such as an act of God, is allowed to re-activate that establishment in a non-conforming manner. This is simply not what the statute says, nor could I locate any Tennessee cases interpreting the statute as such or addressing this problem at all for that matter.

I thus feel it would be improper for this Court to declare the Murfreesboro ordinance as facially in violation of Section 13-7-208(d). If and when plaintiff loses one of its 44 billboards and desires to reconstruct it in a non-conforming manner, plaintiff should present this novel question to the courts of Tennessee.

RECOMMENDATION

Based on the foregoing, I respectfully recommend that summary judgment be GRANTED for the plaintiff on the claims that portions of Section 6(B) are in violation of the First Amendment to the United States Constitution, and Section 7(L) and Section 7(Z) are in violation of the First Amendment. I further recommend that summary judgment be GRANTED for the defendant on plaintiff's claims that the remainder of the statute is unconstitutional under the First and Fourteenth Amendments. I further recommend that summary judgment be GRANTED in favor of defendant on the plaintiff's claim that the defendant is liable under the Sherman Anti-Trust Act. I further recommend that summary

judgment be GRANTED in favor of defendant on plaintiff's claim that the ordinance is in violation of T.C.A. § 13-7-208. I further recommend that if the Court adopts this recommendation, the Court sever the portions of the statute deemed unconstitutional.[5]

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of service of this notice, and must state with particularity the specific portions of this Report, or the proposed findings or recommendation to which objection is made. Failure to file objections within the specified time waives the right to appeal the District Court's Order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted,

/s/ Kent Sandidge III
UNITED STATES
MAGISTRATE JUDGE

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[5] It is appropriate for the Court to sever the unconstitutional portions of the statute rather than invalidate the entire statute. "[I]nvalid portions of a statute should be severed unless it is clear that the legislature would not have enacted those provisions which are constitutional, independent of those provisions which are not." [citation omitted]. Moreover, a provision is presumed severable if what remains after severance is fully operative as a law. *Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d 1139, 1147 (6th Cir. 1986), *citing INS v. Chadha*, 462 U.S. 919, 931-34 (1983). It appears that Murfreesboro would have enacted the ordinance even without the constitutionally offensive exemption and exception provisions. Furthermore, the ordinance stands on its own as an operative law without these provisions.

No. 94-5406

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OUTDOOR COMMUNICATIONS, INC., Plaintiff-Appellant,	)	ORDER
v.	)	(Filed Aug. 17, 1995)
CITY OF MURFREESBORO, Defendant-Appellant.	)	

BEFORE: JONES and BATCHELDER, Circuit Judges; and JOINER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green pe
Leonard Green, Clerk

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* Hon. Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

OUTDOOR COMMUNICATIONS, INC.,	]	
Plaintiff,	]	CIVIL ACTION NO. 3 90 0231
vs.	]	JUDGE HIGGINS
CITY OF MURFREESBORO, TENNESSEE,	]	
Defendant.	]	

CERTIFIED COPY OF CITY OF MURFREESBORO 1990 SIGN ORDINANCE

STATE OF TENNESSEE)
: SS:
RUTHERFORD COUNTY)

I, the undersigned, JOHN BARBER, do hereby certify that I am the duly appointed, qualified and acting City Recorder of the City of Murfreesboro, Rutherford County, Tennessee, and as such official I further certify that attached hereto is a true and correct copy of an Ordinance passed by the City Council of said City on first reading on August 2, 1990, on second reading on August 9, 1990, and on third and final reading on August 16, 1990.

IN WITNESS WHEREOF, I have hereunto subscribed my official signature and affixed the Corporate Seal of said City this 16th day of August, 1991.

/s/ John Barber
City Recorder

(SEAL)

CITY OF MURFREESBORO
SIGN ORDINANCE
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AN ORDINANCE amending Murfreesboro City Code, Chapter 25-1/4 by adopting a new Sign Ordinance.

WHEREAS, The City of Murfreesboro is one of the fastest growing communities in the southeastern part of

the United States. The principal mode of transportation is by motor vehicle. Due to the heavy traffic on the streets and thoroughfares of this City, and the traffic congestion presently existing, all necessary precautions should be undertaken; and

WHEREAS, It is satisfactorily appearing that the unregulated construction and maintenance of outdoor advertising signs endanger the health, safety and the general welfare of the inhabitants and the unregulated construction and maintenance of outdoor advertising signs create traffic hazards both for motor vehicles and pedestrians and adversely affect the safety factors in traffic movement generally, which signs, when unregulated create obstructions of light, air, and sunshine and, impair visibility of motorists and pedestrians, all of which is an impediment to the fire and police departments in discharging their duties; and further, it satisfactorily appearing that debris, rubbish and other waste materials have been allowed to accumulate and be deposited in and around certain existing signs, creating a health and fire hazard, and, it satisfactorily appearing to the City Council of this City, that the unregulated maintenance, construction and erection of outdoor advertising signs constitutes a public nuisance, all of which is detrimental to the health, morals, comfort, safety, and convenience and welfare of the residents of this City and that the said City Council recognizes a real compelling need to regulate all outdoor advertising signs in the exercise of this City's rights to do so under its police powers and other legal authority generally; and

WHEREAS, It further satisfactorily appears compelling and appropriate to encourage creative and imaginative design and use of signs in order to create a more attractive economic and business climate. It is further the intent of this ordinance to foster and improve the economic vitality of the community by enhancing and protecting the physical appearance of the community. In order to accomplish these purposes it is necessary to regulate the size, location, construction, and manner of display of signs as set forth in this ordinance; and

WHEREAS, Because signs have had to become more aggressive, more numerous, more obtrusive in order to maintain the same level of attention, they threaten to defeat the very purpose for which they were created; and

WHEREAS, Lack of control can cause dangerous conflicts between advertising signs on the one hand and traffic control signs and signals on the other, thus destroying the effectiveness of both. The great increase in automotive traffic has greatly aggravated this danger. There should be no dispute over the priority in importance as between traffic controls and advertising signs; and

WHEREAS, The uncontrolled use of signs and of their shapes, motion, colors, illumination and their insistent and distracting demand for attention can be injurious to the mental and physical well-being of the public and can be destructive to adjacent property values and to natural beauty.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MURFREESBORO, TENNESSEE, AS FOLLOWS:

SECTION 1. INTENT AND PURPOSE

A. Regulation of the location, size, placement, and certain features of signs is necessary to enable the public to locate goods, services, and facilities in the City of Murfreesboro without difficulty and confusion, to encourage the general attractiveness of the community, and to protect property values therein. Accordingly, this Ordinance is enacted to establish regulations governing the display of signs which will:

1. Promote and protect the public health, safety, comfort, morals and convenience;

2. Promote aesthetics in the city;

3. Protect the environment;

4. Enhance the economy and the business and industry of the City by promoting the reasonable, orderly, and effective display of signs, and thereby encourage increased communication with the public;

5. Restrict signs and lights which overload the public's capacity to receive information or which increase the probability of traffic congestion and accidents by distracting attention or obstructing vision;

6. Reduce conflict among signs and light and between public and private information systems; and

7. Promote signs which are compatible with their surroundings, are appropriate to the type of activity to which they pertain, and are expressive of identity of proprietors and other persons displaying signs.

B. As these or any regulations can only establish the mechanical limits of signage and not enforce a level of visual quality in sign design, anyone planning a sign is strongly encouraged to consider:

1. The character of the proposed sign, not only in and of itself but also in terms of the effects such a sign will have upon the character of the surrounding area.

2. The way in which the sign will be read, and whether its size, location, configuration and character are appropriate to its intended audience or whether a more appropriate sign could better serve its intended purpose and at the same time, be less visually disruptive.

3. The character of the sign structure, that is, the physical means of supporting the sign, and whether that structure could be made an integral part of the sign rather than a separate and frequently distracting element.

SECTION 2. DEFINITIONS

For purposes of this ordinance, the following terms, phrases, words, and their derivation shall have the meaning given herein. Words not defined in SECTION 2 shall have the meanings stated within this ordinance. Words not defined in the ordinance shall have the meaning in Webster's Ninth New Collegiate Dictionary, as revised.

(1) ABANDONED SIGN, ABANDONMENT: A sign which was erected off-site or on-site in conjunction with a particular use, that use having been subsequently discontinued, regardless of any intent to resume or not to abandon such sign, shall be deemed abandoned and shall not

hereafter be reestablished. For the purpose of this ordinance, regardless of size, copy on the sign indicating the sign is for lease or rent shall not be construed as a use of the sign.

(2) ATTACHED SIGN: An attached sign is a sign that is fixed or painted to a wall, building or canopy having a permanent or changeable copy face.

(3) BANNERS: A temporary sign made of flexible material designed to attract attention bearing a legend or motto, or advertising message.

(4) CANOPY: A structure constructed of rigid materials, which is attached to and supported by a building and/or by columns, poles, or braces extended to the ground.

(5) CHANGEABLE COPY SIGN: A sign where the frame or face is permanently attached and the copy within the frame or on the face may be made different.

(6) CITY: When used herein shall mean the City of Murfreesboro, Rutherford County, Tennessee.

(7) CITY COUNCIL: City Council when used herein shall mean the City Council of the City of Murfreesboro, Rutherford County, Tennessee.

(8) COMMERCIAL, NONCOMMERCIAL, OR MULTI-TENANT COMPLEX: A building or group of buildings constructed or to be constructed upon a zone lot and used or designed to be used for two or more occupancies.

(9) COMMERCIAL, NONCOMMERCIAL, OR MULTI-TENANT COMPLEX SIGN: A ground sign identifying a commercial or noncommercial complex and/or its tenants.

(10) COMMERCIAL SIGN: Expression related solely to the economic interests of the speaker and its audience. Speech which proposes a commercial transaction. The subject matter is to be considered and not the motivation of the speaker in making the determination.

(11) CONVENIENCE SIGN – A sign not exceeding four and one half (4 1/2) square feet in surface area displayed strictly for the direction, safety and convenience of the public, such as signs which identify rest rooms, parking area entrances and exits, freight entrances and exits.

(12) DILAPIDATION: When a sign is allowed to fall into a state of disrepair, decay, or ruin, and the cost to repair exceeds fifty percent (50%) of the fair market cost, including labor and materials, for the erection of similar sign not needing repairs.

(13) DIRECTIONAL SIGN: A directional sign is a temporary sign located off site which indicates the direction to a special event such as a program, auction, open house or sporting event.

(14) DISPLAY SURFACE AREA: The display surface area shall mean and include the entire area of a single continuous perimeter enclosing the extreme limits of wording, representation, emblem, or any figure of similar character, together with any material or color forming an integral part of the display or used to differentiate such

sign from the background against which it is placed. In any event the supports, uprights, or decorative base shall not be included in determining the display surface area of a sign.

(15) DISTRICTS AND ZONE DISTRICTS: These are synonymous, and are identified and defined herein in Section 4.

(16) ELECTRONIC MESSAGE CENTER SIGNS: A ground sign conveying computerized changeable messages, such as time, date, temperature, weather, or similar noncommercial information.

(17) FENCE: A structure functioning as a boundary or barrier, usually made of posts, boards, wire, or rails.

(18) FLAG SIGNS: A ground sign made of flexible material of distinctive color and designed to attract attention used as a symbol, standard, emblem, or advertising message, permanent in nature which is hoisted on a flag pole, excluding American, State, City or County flags.

(19) FLASHING SIGNS: A sign, the illumination of which is intermittently on and off so as to flash or blink or to reflect light so as to appear to flash, blink, or chase such as metallic or mylartype fluttering materials.

(20) FREE STANDING WALL SIGN: Any self supporting sign not attached to a building, that is painted on, incorporated in or affixed to a free standing masonry wall, used primarily as development identification signs containing only the name of the occupant or complex.

(21) GOVERNMENTAL SIGN: A sign erected and maintained by or for the federal, state or local government or agency thereof.

(22) GROUND SIGNS: A sign which is supported by uprights or braces and permanently attached to the ground but excluding a temporary pole sign.

(23) HEIGHT: See SECTION 5.

(24) HOLIDAY DECORATIONS: Temporary decorations, not including signs, clearly incidental to, and customarily and commonly associated with any national or local holiday.

(25) INDIRECT ILLUMINATION: A source of light which is not seen directly.

(26) INFLATABLE SIGNS: A temporary inflated sign, which may be stationary or mobile, that is used to attract attention, which may or may not bear a message.

(a) An inflatable stationary sign is anchored in such a fashion that does not allow it to move.

(b) An inflatable mobile sign is one which is tethered so that it moves and free floats.

(27) INTERSTATE ON-SITE SIGN: An On-Site sign located within a three thousand (3000) foot radius of the center of an interchange and/or within one thousand (1,000) feet of the interstate right-of-way.

(28) LOT: Means lot of record.

(29) LOT OF RECORD: A tract of land whose existence, location, boundaries, and dimensions have been legally recorded in a deed or plat and filed as a legal record and including any that is filed on record in the Register's Office of Rutherford County, Tennessee. If a building sits on two or more lots, it is considered one lot of record for purposes of this ordinance.

(30) MAINTENANCE: To keep in existing state of repair; preserve from decline. The upkeep of property.

(31) MOVING SIGN: Signs which swing, undulate, or otherwise attract attention through the movement of part or through the impression of movement.

(32) NAME PLAQUES, ADDRESS PLAQUES AND HOME OCCUPATION IDENTIFICATION SIGN: An attached sign, nor exceeding two (2) square feet of surface area indicating the name of the occupant, the address of the premises, and identification of any legal single business or operation which may exist at the premises.

(33) NONCOMMERCIAL SIGN: Any sign that is not a commercial sign. If a sign could reasonably be construed as either commercial or noncommercial, this ordinance shall be liberally construed in favor of free speech and the sign shall be construed as noncommercial.

(34) NONCONFORMING SIGN: Any sign legally constructed or erected prior to the effective date of any ordinance or amendment containing provisions with which such sign does not comply. (A sign constructed illegally in violation of any prior law, ordinance or code is not made legal by this ordinance unless it conforms to all the requirements of this ordinance.)

(35) OFF-SITE SIGN: An off-site sign is a sign or a portion thereof which directs attention to a business, profession, commodity, service or entertainment, which is not primarily conducted, sold or offered upon the same lot of record. Notwithstanding the foregoing or any provision of this ordinance, this ordinance shall not prohibit

noncommercial speech displayed on an off-site sign provided it does not violate Section 7, Prohibited Signs.

(36) ON-SITE: An on-site sign or portion thereof is a sign which directs attention to a business, profession, commodity, service or entertainment, which is primarily conducted, sold or offered upon the same lot of record. Notwithstanding the foregoing or any provision of this ordinance, this ordinance shall not prohibit noncommercial speech displayed on an on-site sign provided it does not violate Section 7, Prohibited Signs.

(37) PARAPET: A vertical false front or wall extension above the roof line.

(38) PENNANT: A temporary sign which is a colored flag sometimes bearing an emblem, dealership flag or drape, suspended or projecting from a private light pole, perimeter poles, or dedicated pole.

(39) PERSON: Person means any individual, firm, partnership, corporation, company, association, or joint stock association and includes any trustee, receiver, assignee, or other similar representative thereof.

(40) POLE SIGN: A limited use On-Site sign which is used for promotional type advertising temporarily attached to perimeter poles, private light poles, canopy poles, or other similar poles, but not including flag poles.

(41) PORTABLE SIGN: A portable sign shall include any advertising sign or device, counterbalance sign, trailer sign, or any variation thereof, located on the ground, easily moveable, not permanently attached thereto and which is usually a two-sided sign and including any single or double surface painted or poster panel

type sign or any variation thereof, which is temporary in nature.

(42) ROW: ROW means right-of-way line.

(43) RIGHT-OF-WAY LINE: The boundary line or margin of the area adjacent to public streets, roads and highways over which exists an easement or easements or other right to install and maintain public improvements including but not limited to over head and under ground power lines, telephone lines, water lines, sewer lines, drainage facilities including open ditches and storm water sewers and culverts, regardless of whether the right to construct those public improvements in the area was acquired by grant, by prescription or by exercise of the power of eminent domain. The right-of-way line will usually be parallel to the margin of the public street, road or highway but exceptions to this general rule may exist for each separate parcel of real property. This Sign Ordinance does not supersede any right-of-way requirement for the State.

(44) ROOF: The exterior upper covering of the top of a building.

(45) ROOF SIGN: An attached sign wholly or partially dependent upon the roof of any building for support. A roof does not include a mansard mounted on a parapet wall.

(46) SETBACK: A line located parallel to and a specified distance from the right-of-way line, curb line, or the edge of the street pavement, said distance being as specified in the applicable section of this sign ordinance and

behind which line a sign allowed under this ordinance may be constructed, erected, or otherwise maintained.

(47) SIGN: The term "sign" shall mean street graphics and include frame, letter figure, character, make, plain, point, marquee, design, picture, poster, stroke, banner, streamer, pennant, bunting, inflatable sign, strike, line, flag, logotype, trademark reading matter, illuminating device, or any device used for the illumination of such which is used or intended to be used to attract attention or convey information when the same is placed outdoor in the view of the general public or for the purpose of attracting the general public to any place, or any business, or any person, firm or corporation or to any public performance, or to any article, machine or merchandise of any nature whatsoever and which is displayed in any manner whatsoever.

(48) SIGN AREA: Sign area means the total number of signs and/or display surface area on any one premises, or lot of record or commercial industrial developments and complexes.

(49) SIGNABLE AREA: Sign area means the total number of signs and/or display surface area permitted in this ordinance on any one premises, or lot of record or commercial industrial developments and complexes.

(50) SIZE: Refers to display surface area

(51) STREAMER: A series of long narrow banners, flags, or pennants attached to a cord.

(52) STRING LIGHTING: String lighting of rigid or flexible construction used to outline a building structure and used to attract attention for commercial purposes.

(53) STRIP LIGHTING: Attached neon tubing which is of constant intensity which is placed on the exterior of a building for the purpose of attracting the attention of the general public to any place or business.

(54) SUBDIVISION, COMMERCIAL, NONCOMMERCIAL, INDUSTRIAL, OR MULTI-FAMILY DEVELOPMENT IDENTIFICATION SIGN: A sign located at the entrance utilized to designate a residential subdivision, or commercial, noncommercial, industrial or multi-family development.

(55) TAX EXEMPT ORGANIZATION: An organization income tax exempt pursuant to Section 501 (c) (3), (4) or (5) Internal Revenue Service Code of 1986.

(56) TEMPORARY SIGN: Any sign which is by reason of construction or purpose to be used for a limited period of time.

(57) THEATER SIGN: A ground sign used for the purpose of advertising motion pictures shown in a theater.

SECTION 3. SIGN PERMITS AND FEES

(A) It shall be unlawful for any person, corporation, or association to erect, prepare, alter, relocate or keep within the City any sign or other advertising structure as defined in this ordinance on a lot of record without first obtaining a sign permit from the Building Inspections Department and paying the permit fee required by this section.

(B) *APPLICATION FOR SIGN PERMIT:* Application for a sign permit shall be made upon forms provided by

the Building Inspections Department, and shall include information required by and set forth:

(1) Name, address and phone number of the owner.

(2) Name, address and phone number of the contractor.

(3) The proposed use of the sign.

(4) Location of building, structure, or lot to which or upon which the sign or other advertising structure is to be attached or erected.

(5) Attached Signs – (a) A dimensional sketch showing the position of the sign in relation to the building or structure to which it will be attached. The linear footage of the building frontage and signs in existence at the time of the application shall be included. (b) Roof signs – shall submit plans to show compliance with the applicable provisions of the adopted *Standard Building Code*, as amended.

(6) Ground Signs, On-Site less than 35' in height – a) Two (2) dimensional sketches showing the height, shape and surface area display of the sign. b) Two (2) dimensional sketches of the foundation for the sign. c) Two (2) dimensional site plans, showing the location of the sign on the site. The setbacks from rights-of-way and power lines shall be included, as well as the spacing from other ground signs in existence at the time of the application.

(7) Ground Signs On-Site greater than 35' in height – Same as required in (6), except all plans required

must be drawn to scale and must be sealed by a registered Tennessee Engineer, who shall also specify the wind load design in accordance with the applicable provisions of the adopted *Standard Building Code,* as amended.

(8) Off-site Ground Sign – Scaled site plans showing same as (7), plus location plans showing spacing of existing Off-site permanent Ground Signs within one thousand (1000) feet on the same side of the street or interstate highway in both directions.

(9) Before any sign permit can be issued, a copy of the application requesting electrical permit for the proposed sign must be obtained and filed with sign permit application and filed with the building inspector. A separate electrical permit will not be required if specifically included in any other electrical permit.

(C) *SCHEDULE OF SIGN PERMIT FEES:*

(1) The fee for all signs not exempt from the fee shall be $10.00 plus $.50/sq. ft. of surface area display, except Portable Temporary Signs (Section 8-G) the fee shall be a flat rate of $15.00.

(2) The fee for Strip Lighting shall be $10.00 plus $.25/per linear foot.

(3) For the relocation or moving of any sign or sign structure, the fee shall be fifteen dollars ($15.00), except, no fee shall be required if such move is being made in order to comply with this ordinance where prior to such move the sign was legal nonconforming. To relocate on a different lot of record the other provisions of this SECTION shall apply.

(4) For the demolition of any permanent sign or sign structure, the fee shall be fifteen dollars ($15.00), except, no fee shall be required, if such demolition is being made in order to remove a legal nonconforming permanent sign.

(5) Any tax exempt organization pursuant to Section 501 (c) (3), (4), or (5), Internal Revenue Code, shall be required to obtain a permit but no permit fee shall be required.

(D) Before any sign permit can be issued, the proposed location shall be marked by stake or caulk line or other similar manner, for location inspection.

(E) All signs must be installed in compliance with the applicable provisions of the adopted *Standard Building Code*, as amended.

(F) *ISSUANCE OF SIGN PERMIT:* It shall be the duty of the Permits and Inspections Officer, upon the filing of an application for a permit to erect a sign, to examine such plans and specifications and other data regarding the proposal to erect or maintain the sign or other advertising structure, and if it shall appear that the proposed structure is in compliance with all of the requirements of this ordinance and all other laws and ordinances of the City, the Permits Officer shall then refer to the Codes Enforcement Officer for location inspection. Upon approval of the Codes Enforcement Officer of the application for Sign Permit, the Permits Officer shall issue the Permit.

If it shall appear that the proposed structure is in compliance with all of the requirements of this ordinance

and all other laws and ordinances of the City, he shall then be issued the sign permit within the next three (3) working days. If said application is not in compliance with this ordinance then within the next three (3) working days the building inspector shall state his refusal to the applicant.

Upon issuance of the Sign Permit the Codes Enforcement Officer will examine the premises for a footing inspection. (Footing inspections are not required on signs that are sixty-four (64) square feet or less and the height does not exceed sixteen (16) feet.) It is the responsibility of the contractor to call the Building Inspections Office and request a footing inspection and shall not proceed with construction until said inspection is made.

Final Inspections are required to be done by the Codes Enforcement Officer upon installation of the proposed sign. It is the responsibility of the contractor to call the Building Inspections Office and request a final inspection for the sign and electrical inspection.

If work authorized under a permit for erection for a sign that has not been completed within six (6) months (180 days) after the date of issuance, the said permit shall become null and void. The issuance of a sign permit shall in no instance be construed as waiving any provisions of this ordinance.

(G) *FAILURE TO OBTAIN PERMIT:* Failure to obtain a permit prior to beginning construction shall automatically result in a penalty of double the permit fee.

Failure to obtain an inspection, shall automatically result in a penalty of double the permit fee. No additional

permits will be issued to an applicant who has any outstanding penalties.

(H) *LABELS TO BE AFFIXED:* Upon examination, the Codes Enforcement Officer determines that a sign has been installed in conformance with the provisions of this ordinance, he shall cause a label to be issued bearing the number of the permit and further identifying specifically the sign which the permit authorizes.

This label shall then be affixed to the sign by the permitee in a manner so that the permit will be readily visible for inspection purposes. Absence of such a label upon any sign constructed or installed within the municipal limits shall be prima facie evidence of failure to meet the requirements of this ordinance.

(I) *PERMIT REVOCATION:* Permits issued under this ordinance shall be valid for the life of the sign approved. However, any permit may be revoked by the Chief Building Official upon his determination that the sign is not in full compliance with the provisions of this ordinance.

(J) *DEPOSITS:*

(1) Inflatable – Each business displaying such signs shall pay a fee of fifty dollars ($50.00) which is refundable when his 30 day flight has expired. A permit and permit fee is also required for each flight.

(2) *Portable* – Each business displaying such signs shall pay a fee of fifty dollars ($50.00) which is refundable when his 60 days display has expired. A permit and permit fee is also required.

SECTION 4. DISTRICTS AND ZONED DISTRICTS DEFINED AND SIGN MAP ADOPTED

All signs permitted to be constructed, erected, and maintained under this ordinance, shall be permitted only in the designated districts. "District" or "Zone District" when used herein shall be and mean those areas which are zoned as and identified as such in the Comprehensive Zoning Ordinance, adopted January 19, 1984, as amended and as may be amended hereafter. For further reference and for further identification of the said "Districts" and "Zoned Districts, the official zoning map of the City, as amended and as may be amended hereafter, and which is a part of the said Comprehensive Zoning Ordinance, as incorporated and adopted herein by reference, as if set forth verbatim. The said map or a copy of the same shall be on file for reference for the administration of this ordinance in the building inspector's office.

SECTION 5. COMPUTATION OF SIGN AREA, HEIGHT, AND POWER LINE SETBACKS.

(A) In computing the area of all signs permitted under this ordinance, the same shall be computed as follows:

(1) When two signs of the same shape and dimensions are mounted or displayed back to back and parallel, only one such face shall be included in computing the total display surface area of the sign.

When two signs of the same shape and dimensions are mounted or displayed in a V-shape, not back to back and parallel, each such face shall be included in computing the total display surface area of the sign.

(2) The display surface area of an attached sign consisting of individual letters, not enclosed by a box or outline, shall be the sum of the next a ea of each letter. Area of letter equal shaded areas only.

Example: A B C D

Individual letters on a mansard mounted on a parapet wall shall not exceed a height of 75% of the mansard and 50% of the area. (This does not pertain to canopies.)

(3) The display surface area of a sign consisting of connected letters or letters enclosed by a box or outline of any kind shall be the total area of the sign including the background, box or outline.

Example:

S I G N

(4) The display surface area of a multi-faced sign shall be one-half (1/2) of the sum of all surface area forming a part of the display.

(B) HEIGHT MEASUREMENT:

Sign height shall be measured from the ground at the center of the sign to the highest point of the highest element of the sign, excluding any incidental structural element.

Notwithstanding any other provision of this ordinance, when a sign is located within two hundred (200) feet of a residential zone the maximum height for the sign shall be sixteen (16) feet. Ground signs shall not exceed the height requirements as set forth in SECTION 9(A) & 9(B).

(C) CLEARANCE FROM ELECTRICAL POWER LINES:

Power lines. The closest part of a sign shall not be any closer than eight (8) feet horizontally from a vertical line above and below the nearest primary conductor(s). The closest part of a sign shall not be any closer than eight (8) feet horizontally from a conductor not attached to the sign.

As an exception to the foregoing, when the measurement is from the sign to an insulated secondary conductor not exceeding 600 volts, no portion of the sign may be within eight (8) feet of the insulated secondary conductor measured horizontally, vertically, or diagonally. A convenience sign under three (3) feet in height may be placed under a power line.

SECTION 6. EXEMPTIONS

A. Exemptions shall not be construed as relieving the owner of such signs from the responsibility of complying with certain applicable provisions of this ordinance. All signs within the City of Murfreesboro must comply with right-of-way or curb line sets backs, electrical set backs, maintenance provisions and electrical permits and inspections as required in SECTION 3, except for governmental signs which may be in the right-of-way and convenience signs which may be zero set back.

(B) *SIGNS EXEMPT FROM SIGN PERMIT OR PERMIT FEES REQUIREMENTS:*

(1) American, State, City, County flags

(2) Address Signs (street number)

(3) Banners

(4) Convenience Signs

(5) Governmental Signs

(6) Holiday decorations

(7) Name and/or Address Plaques

(8) Pennants

(9) Scoreboard and ball field fence signs located inside athletic fields owned by a government entity

(10) Noncommercial permanent signs not exceeding four and one-half (4 1/2) square feet in surface area

(11) Signs on the inside of windows

(12) Signs painted on the outside glass surfaces of windows or doors and indicating name, address and hours of the lawful business conducted therein, provided such signs do not cover more than fifteen (15) per cent of the total window area to which it is applied. See also SECTION 7 for prohibited window signs.

(13) Streamers

(14) Temporary signs, except inflatable and portable signs

(15) Vehicle Signs, except as prohibited in SECTION 7

SECTION 7. PROHIBITED SIGNS

It shall be unlawful for any person to erect or maintain a sign which is prohibited has follows:

(A) A sign which copies or imitates or in any way approximates an official highway sign or carries the words "STOP" or "DANGER"; or any sign which obscures a sign displayed by public authority for the purpose of giving traffic instruction or direction or other public information. Signs which imitate traffic control devices. Signs which imitate, interfere with, obstruct the view of, or can be confused with any authorized traffic control sign, signal, or other similar device.

(B) A sign or illumination that causes any direct glare into any building other than the building to which the sign may be accessory.

(D) Flashing Signs, except as used as holiday decorations in a residential zone. Electronic Message Center Signs are permitted, provided the message is noncommercial.

(D) Roof Signs painted on the roof or which extend above the highest point of the roof, except inflatable signs.

(E) Signs on Parked Vehicles. Signs placed on or affixed to vehicles and/or trailers which are parked on a right-of-way, public property, or private property so as to be visible from a public right-of-way where the apparent purpose is to advertise a message. However, this is not in any way intended to prohibit signs placed on or affixed to motorized vehicles, where the sign is incidental to the primary use of the motorized vehicle or trailer. It shall be unlawful to use a vehicle or a trailer sign as a sign in circumvention of this ordinance.

(F) Signs which are attached or otherwise affixed to trees or other living vegetation, and utility poles.

(G) A sign placed in a right-of-way, except as required by appropriate Federal, State, City or County governmental authorities.

(H) No permanent sign, or part thereof, shall contain or consist of banners, pennants, ribbons, streamers, spinners, or other similar moving, or fluttering devices. Banners, pennants, ribbons, streamers, spinners, and fluttering devices shall not be attached to other temporary signs.

(I) Signs which revolve or rotate.

(J) Signs incorporating any noisy mechanical device.

(K) String lighting in a commercial or industrial zone, except used as a Christmas decoration, in which event, the lighting will not be erected before November 15 and must be removed by January 15.

(L) Signs displaying pornographic matter.

(M) Temporary signs which violate Section 8.

(N) No sign shall be erected, constructed, or maintained so as to interfere with any existing Warning or Instructional Sign.

(O) No electrical light or fixture shall be attached in any manner to any sign unless it is installed in accordance with Article 600 of the *National Electrical Code*, as amended.

(P) No sign of any type or any foundation or vertical support thereof shall be placed in or over any dedicated street, highway, sidewalk, or in any utility and drainage easement, except as excluded.

(Q) No advertising signs shall be allowed on trash receptacles or benches.

(R) No attached sign shall extend more than eighteen (18) inches beyond the surface to which it is attached.

(S) The placing of banners across the street is prohibited. (See Sec. 28-15.)

(T) Owners consent. Any sign placed on, in, or over any private property without the written consent of the property owner and any sign placed on, in, or over any public property, including public rights-of-way without the written consent of the public authority having jurisdiction over the property is prohibited.

(U) Obstructions. No signs, nor any means of supporting or staying such signs shall be placed or constructed so as to obstruct or interfere with any door, window, fire escape or other means of egress, light or ventilation. No sign shall be located in such a position that the same obscures the view of pedestrian or vehicular traffic in such a manner as to endanger the safe movement thereof.

(V) Terminated activity. Signs which advertise a terminated activity, business, product, or service no longer produced or conducted on the premises upon which the sign is located are prohibited, provided, however, that where premises are temporarily vacant such sign face

may remain in place for not more than one hundred twenty (120) days from the date the vacancy began.

(W) Unlawful cutting of trees and shrubs. No person may, for the purpose of increasing or enhancing the visibility of any sign, damage, trim, destroy, or remove any trees, shrubs, or other vegetation located:

(1) Within the right-of-way of any public street or road, unless the work is done pursuant to the express written authorization of the city or State, whichever is appropriate.

(2) On property that is not under the ownership or control of the person doing or responsible for such work unless the work is done pursuant to the express authorization of the person owning the property where such trees or shrubs are located. Notwithstanding the foregoing, the owner of the property where such trees or shrubs are located may not give permission to remove or destroy trees or shrubs required by his site plan without first obtaining approval of an amendment to the site plan by the planning commission of the city.

(3) In any area where such trees or shrubs are required to remain under a permit issued under this ordinance.

(X) Signs applied to the exterior of the window which are larger than fifteen (15) percent of the outside window area are prohibited.

(Y) Signs which contain false, misleading or deceptive information.

(Z) Signs which promote or are related to illegal activity.

(AA) Signs which are not expressly permitted by this ordinance. Nothing herein shall prohibit non-commercial speech displayed on an on-site or off-site sign. This section supersedes any other section that is contrary.

SECTION 8. TEMPORARY SIGNS

The total combined use of the following temporary signs shall not exceed three (3) signs per lot at any one given time.

The maximum signable area shall not exceed the size set forth below herein. It shall be unlawful to erect or maintain temporary signs in violation of the following:

(A) Banners
- (1) Number – 2 per lot maximum on-site
- (2) Size – 120 sq. ft. combined maximum area display
- (3) Setback – 1' ROW, 8' Power lines minimum
- (4) Height – N/A
- (5) Timing – N/A
- (6) Permit/fee – N/A
- (7) Method of Display – Attached to building or canopy only
- (8) Zone – All zones, except residential zones

(B) Directional Signs
- (1) Number – 4 per event off-site, 2 per lot
- (2) Size – 16 sq. ft. maximum
- (3) Setback – 1' ROW
- (4) Height – 4.5' maximum
- (5) Timing
  - (a) erection: 10 days before the event
  - (b) removal: 2 days after the event
- (6) Permit fee – None
- (7) Zone – All

(C) Inflatable Signs – Stationary
- (1) Number – 1 per lot maximum on-site
- (2) Size – N/A
- (3) Setback – 5' ROW, 8' Power Lines minimum plus the distance to its inflated height minimum.
- (4) Height – N/A
- (5) Timing – 90 day per year maximum, 30 consecutive days allowed one time with a minimum of 30 consecutive days between flights.
- (6) Permit/Fee – Permit, Fee, and Refundable Deposit of $50.00 required for each flight.
- (7) Zone – CP, CH & I

(D) Inflatable Signs – Mobile
- (1) Number – 1 per lot maximum on-site
- (2) Size – N/A
- (3) Setback – 5' ROW, 8' power lines plus the distance to its extended height minimum.
- (4) Height – 120 feet maximum
- (5) Timing – 90 day per year maximum, 30 consecutive days allowed at one time with a minimum of 30 consecutive days between flights.
- (6) Permit/Fee – Permit, fee, and refundable deposit of $50.00 required for each flight.
- (7) Zone – CP, CH & I

(E) Pennants
- (1) Number – One (1) every fifty (50) feet of frontage
- (2) Size – 9 sq. ft. maximum

(3) Setback – 1' ROW, 8' Power Lines minimum
(4) Height – 35' maximum
(5) Timing – N/A
(6) Permit/fee – N/A
(7) Zone – CP, CH & I

(F) Pole Signs
(1) Number – 3 per lot maximum on-site
(2) Size – 21 sq. ft. maximum
(3) Setback – 1' ROW, 8' power lines minimum
(4) Height – N/A
(5) Timing – N/A
(6) Permit/Fee – N/A
(7) Zone-CL, CP, CH, & I

(G) Portable Sign
(1) Number – 1 per lot maximum on-site, only.
(2) Spacing – 150 feet from another temporary sign
(3) Size – 32 sq. ft. maximum
(4) Setback – 5' ROW, 8' Power Lines minimum
(5) Height – Minimum 18", Maximum 7'
(6) Timing – six (6) months per year maximum, 60 consecutive days allowed at one time with a minimum of 30 consecutive days between uses.
(7) Permit/fee – Permit required, fee required plus a refundable deposit of $50.00.
(8) Zone – CP, CH & I
(9) Anchoring – Sign shall be secured to the ground at four (4) points by means of one-half (1/2) inch diameter spike or bolt, driven eighteen (18) inches into the ground.
(10) Electrical safety – Sign shall be UL approved. If not UL approved, plug must be

removed or housed within sign casing prior to placement. Where an electrical cord is being extended it shall be in rigid conduit that is either underground or along the ground surface, which will not be crossed by traffic, and secured to the ground surface, except that a maximum of eighteen (18) inches of flexible conduit is permitted at each end. The connecting plugs shall be of a weatherhead type. The electrical installation shall meet all code requirement. Flasher must be removed or bypassed prior to electrical connection.

(H) Streamers
- (1) Number – On-Site, three (3) linear feet of streamers for every one (1) ft. of road frontage maximum
- (2) Size – N/A
- (3) Setback – 1' ROW, 8' Power Lines minimum
- (4) Height – 35' maximum
- (5) Timing – N/A
- (6) Permit/fee – N/A
- (7) Zone – CL, CP, CH & I

(I) Other Temporary Signs
- (1) Number – 3 per lot maximum on site
- (2) Size
  - (a) CP, CH, & I zones – 64 sq. ft. maximum
  - (b) RS, RD, RQ zones – 16 sq. ft. maximum
  - (c) Other zones – 32 sq. ft. maximum
- (3) Height
  - (a) CP, CH, & I zones – 12' maximum
  - (b) RS, RD, RQ zones – 6' maximum

(c) Other zones – 8' maximum
(4) Set back – 1' ROW
(5) Timing – until 10 days following conclusion of temporary purpose
(6) Permit fee – None
(7) Zone – All

SECTION 9. ON-SITE PERMANENT SIGN REQUIREMENTS

(A) *NUMBER AND SIGNABLE AREA OF SIGNS:* Except as authorized by this section, it shall be unlawful to have more than one (1) ground sign on a lot of record, or in violation of the regulations set forth herein.

If the lot of record is a corner lot that has at least one hundred (100) feet of frontage on each of the two (2) intersecting public streets, then there shall be no more than one (1) ground sign along each side of the lot of record bordered by such streets, not to exceed the total signable area allowed.

If the lot of record is bordered by two (2) public streets that do not intersect at the boundaries of the lot (in other words, the lot has double frontage), then the person shall have no more than one (1) ground sign on each side of the development bordered by such streets.

When the number of signs listed is greater than one, the size set forth shall be for each sign unless otherwise indicated.

(B) *SPACING:* Fifty feet (50') minimum spacing on the same lot of record for ground signs.

(C) The following signs shall be permitted in the districts hereafter set forth.

(1) *SIGNS PERMITTED IN RS, RD, RQ, RML, RMH, & RMO ZONING DISTRICTS (EXCEPT AS NOTED):*

(a) Commercial (except home occupation) and Tax exempt organizations

(i) Type – Attached
Number – 1 per lot maximum
Size – 3 sq. ft. per linear ft. of bldg frontage not to exceed 40 sq. ft. maximum
Setback – N/A
Height – N/A
Illumination not permitted

(ii) Type – Ground
Number – 1 per lot maximum
Size – 40 sq. ft. maximum
Setback – 5' right-of-way, 8' power lines minimum
Height – 16' maximum
Illumination not permitted

OR

(iii) Type – Free Standing Wall Sign
Number – 1 per entrance
Size – Letters shall not exceed 24" in height
Display surface – Shall not exceed 40 sq. ft.
Setback – 5' right-of-way, 8' power lines minimum
Height – 8' maximum

(b) Home Occupation
Type – Attached
Number – 1 per lot maximum
Size – 2 sq ft maximum
Setback – N/A
Height – N/A
Illumination not permitted

(c) Subdivision or Multi-Family Development ID Sign

(i) *Type – Free Standing Wall Sign – See notation
Number – 2 per development entrance maximum
Size – Letters shall not exceed 24" in height
Display Surface – Shall not exceed 40 sq. ft.
Setback – Shall not obstruct the view from vehicles entering or exiting the development.
Height – 8' maximum
Illumination – indirect only

OR

(ii) *Type – Ground
Number – 1 per development entrance maximum
Size – 40 sq. ft. maximum
Setback – Shall not obstruct vision
Height – 8' maximum
Illumination – indirect only

*NOTATION: a. The location, height, setback, size, and illumination shall be permitted subject to the approval of the Murfreesboro Planning Commission. Once approved by the Murfreesboro Planning Commission, a permit shall be obtained and a fee paid.

b. These signs are intended to be in well-landscaped areas where the developer has set-up a property owner's association for their maintenance and shall place in escrow an amount equal to or greater than $25.00 per lot for the maintenance of said sign.

(d) Flag Signs
Type – Ground
Number – 4 per entrance, 8 flags maximum per lot
Size – 32 sq. ft. maximum
Setback – 5' ROW, 8' power lines minimum
Height – 35' maximum
Illumination – Indirect only
Zone – RML, RMH, RMO only

(2) *SIGNS PERMITTED IN OG, CM, CL, CU & P:*
(a) Commercial and Noncommercial Uses – Single Occupant
(i) Type – Attached
Number – 3 per lot maximum
Size – 3 sq. ft. for each linear foot of bldg. frontage not to exceed 100 sq. ft. maximum
Setback – N/A
Height – N/A
(ii) Type – Ground
Number – 1 per lot maximum
Size – 60 sq. ft. maximum
Setback – 5 right-of-way, 8' power lines minimum
Height – 16' maximum
OR
(iii) Type – Free Standing Wall Sign
Number – 2 per development entrance maximum
Size – Letters shall not exceed 24" in height
Display surface – Shall not exceed 40 sq. ft.

Setback – 5' right-of-way, 8' power lines
Height – 8' maximum

(b) Commercial, Noncommercial, or Multi-Tenant Complex
Type – Ground
Number – 1 per lot maximum
Size – 75 sq. ft. maximum
Setback – 5' right-of-way, 8' power lines minimum
Height – 16' maximum

(c) Each Occupant of a Commercial, Noncommercial or Multi-Tenant Complex
Type – Attached
Number – 1 per tenant
Size – 3 sq. ft. per linear foot of tenant frontage not to exceed 100 sq. ft. maximum
Setback – N/A
Height – N/A

(d) Flag Signs
Type – Ground
Number – 4 per entrance, 8 flags maximum per lot
Size – 32 sq. ft. maximum
Setback – 5' ROW, 8' power lines minimum
Height – 35' maximum
Permitted for all uses this section except (4)

(3) *SIGNS PERMITTED IN CBD DISTRICT:*

(a) Commercial and Noncommercial Uses – Single Occupant
(i) Type – Attached
Number – 1 per street frontage maximum

Size – 3 sq. ft. per foot of linear bldg. frontage not to exceed 100 sq. ft. maximum
Setback – N/A
Height – N/A

(ii) Type – Ground
Number – 1 per lot maximum
Size – 60 sq. ft. maximum
Setback – 5' right-of-way, 8' power lines minimum
Height – 16' maximum

OR

(iii) Type – Free Standing Wall Sign
Number – 1 per entrance maximum
Size – Letters shall not exceed 24" in height
Display surface – Shall not exceed 40 sq. ft.
Setback – 5' right-of-way, 8' power lines minimum
Height – 8' maximum

(b) Commercial, Noncommercial & Multi-Tenant Complex

(i) Type – Ground
Number – 1 per lot maximum
Size – 75 sq. ft. maximum
Setback – 5' right-of-way, 8' power lines minimum
Height – 16' maximum

OR

(ii) Type – Free Standing Wall Sign
Number – 2 per entrance maximum
Size – Letters shall not exceed 24" in height
Display surface – Shall not exceed 40 sq. ft.

Setback – 5' right-of-way, 8' power lines
Height – 8' maximum

(c) Each Business, Commercial, Noncommercial & Multi-Tenant Complex
Type – Attached
Number – 1 per business maximum
Size – 3 sq. ft. per linear tenant frontage not to exceed 100 sq. ft. maximum
Setback – N/A
Height – N/A

(4) *SIGNS PERMITTED IN CH, CP, & I DISTRICTS:*

(a) Commercial, Noncommercial, and Industrial Development ID Sign
(i) *Type – Ground
Number – 1 per development maximum
Size – 100 sq. ft. maximum
Setback – less than 5' ROW, height 16' maximum
Setback – 5' or more ROW, height 35' maximum

OR

(ii) *Type – Free Standing Wall Sign
Number – 2 per development entrance maximum
Size – letters shall not exceed 24" in height maximum
Display surface – Shall not exceed 40 sq. ft.
Setback – Shall not obstruct view from vehicles entering or exiting the development.
Height – 8' maximum

*NOTATION: a. The location, height, size, and illumination shall be permitted subject to the approval of the Murfreesboro Planning Commission. Once approved by the Murfreesboro Planning Commission, a permit shall be obtained and a fee paid.

b. These signs are intended to be in well-landscaped areas where the developer has set-up a property owner's association for their maintenance and shall place in escrow an amount equal to or greater than $25.00 per lot for the maintenance of said sign.

(b) Commercial, Noncommercial or Industrial – Single occupant

(i) Type – Attached
Number – 3 per structure maximum
Size – 3 sq. ft. per linear ft. of bldg. frontage not to exceed 150 sq. ft. (it is the intent of this ordinance that the total aggregate of attached signs for the occupant shall not exceed 150 sq. ft.)
Setback – N/A
Height – N/A

(ii) Type – Strip Lighting
Size – Three (3) linear ft. of strip lighting per one (1) linear ft. of building frontage.
Set back – N/A
Height – N/A
Specifications – Required UL approval. Prohibited on wood.

(iii) Type – Ground
Number – 1 per lot maximum
Size – 200 sq ft. plus 1 additional sq. ft. for each linear foot street

frontage exceeding one hundred (100) feet not to exceed 300 sq. ft. maximum

Setback – 5' right-of-way, 8' power lines minimum

Height – 16' maximum when located within 200 ft. of a Residential Zone, otherwise 35' maximum

OR

(iv) Type – Free Standing Wall Sign
Number – 2 per entrance maximum
Size – Letter shall not exceed 24" in height
Display surface – Shall not exceed 40 sq. ft.

(c) Flag Signs
Type – Ground
Number – 4 per entrance, 8 flags maximum per lot
Size – 32 sq. ft.
Height – 35' maximum
Setback – 5' right-of-way, 8' power lines

(d) Commercial, Noncommercial or Multi-Tenant Complex
Type – Ground
Number – 1 per lot maximum
Size – 200 sq. ft. plus 1 additional sq. foot for each foot of linear street frontage over 200 ft., not to exceed 300 sq. ft. maximum
Setback – 5' right-of-way, 8' power lines minimum

Height – 16' maximum when located within 200 ft. of a Residential Zone, otherwise 35' maximum

(e) Theaters

Type – Ground
Number – 1 per lot maximum
Size – 300 sq. ft. maximum
Setback – 5' right-of-way, 8' power lines minimum
Height – 16' maximum when located within 200 ft. of a Residential Zone, otherwise 35' maximum

(f) Each Occupant of a Commercial, Noncommercial or Multi-Tenant Complex

Type – Attached
Number – 2 per business maximum
Size – 3 sq. ft. per linear ft. tenant frontage, not to exceed 150 sq. ft.
Setback – N/A
Height – N/A

(g) Interstate On-Site Signs

Type – Ground
Location – Within three thousand-foot radius of the center of the interchange and within one thousand (1000) feet of the interstate right-of-way
Number – 1 per lot of record maximum
Size – 300 sq. ft. maximum
Height – 120' maximum, except when the sign is located within two hundred feet of

a Residential Zone the maximum height shall be sixteen feet in height
Setback – 5' ROW, 8' power lines minimum

(D) Nothing in this section shall be construed to limit or curtail noncommercial speech in favor of commercial speech. A person may erect a sign in conformity with this section that is used in whole or part for noncommercial speech.

SECTION 10. OFF-SITE PERMANENT SIGN REQUIREMENTS

(A) Except as authorized by this ordinance, no off-site permanent sign may be erected on any lot of record. The requirements for permanent off-site signs are set forth below herein. Off-site permanent signs are permitted as follows:

(1) Location: CH, & I zoning districts
Lot on which sign is to be erected, must be contiguous with the Interstate
(2) Height: 50' maximum
(3) Size: 775 sq. feet maximum
(4) Setback – 5' minimum from street or interstate right-of-way and 200 foot maximum from interstate right-of-way.
(5) Spacing: 1000' minimum to any other off-site permanent sign in both directions on the the [sic] same side of interstate or street. 1000' minimum of an interchange, or intersection at grade, measured along the interstate from the nearest

point of the beginning or ending of pavement widening at the exit or entrance to the main traveled way.

(B) Nothing in this section shall be construed to limit or curtail noncommercial speech in favor of commercial speech. A person may erect a sign in conformity with this section that is used in whole or part for noncommercial speech.

SECTION 11. SIGN MAINTENANCE AND OTHER SPECIFICATIONS FOR ERECTION AND MAINTENANCE OF SIGNS

(A) PREMISES MAINTENANCE. All ground signs and any other type of sign and the premises surrounding same shall be maintained by the owner thereof in a clean, sanitary, and inoffensive condition, and free and clear of all obnoxious substances, rubbish and weeds.

(B) STRUCTURE MAINTENANCE. Notwithstanding the aforesaid, all signs, together with all their supports, braces, guys and anchors shall be kept in good, safe repair and unless plastic galvanized or noncorroding metal, shall be maintained in good and safe condition including the periodic application of paint or other weatherproofing material to prevent rust or other decay. The Chief Building Official and/or his representative may order the removal of any sign that is not so maintained in accordance with the provision of this section. Such removal or expense incurred to assure compliance of this Ordinance, shall be at the expense of the permittee or such owner of such sign or occupant or property owner where the same is situated or any one or all of

them, who shall be jointly and severally liable for such expense.

(C) DISPLAY SURFACE OR OTHER ADVERTISING SURFACE MAINTENANCE. The display surface or other advertising material of a sign shall not be allowed to deteriorate to a broken, torn, peeling, flaking, or otherwise decayed condition and shall be repaired or removed within 90 days of receipt of notice mailed to the owner by certified mail, return receipt requested, from the Chief Building Official ordering such repair or removal. If the owner fails to remove or alter the display surface so as to comply with the standards herein set forth within the time specified in such notice, such display advertising material may be removed or altered to comply with the Chief Building Official. An appeal may be made to overcome some exceptional condition which poses practical difficulty or particular hardship in such a way as to prevent an owner from repairing the sign within 90 days.

(D) BANNERS, FLAGS, PENNANTS, STREAMERS. Banners, Flags, Pennants, and Streamer signs shall not be allowed to deteriorate to a tattered, torn or faded condition and shall be attached properly at all times. The condition shall be repaired or removed within 30 days of receipt of notice.

SECTION 12. NONCONFORMING SIGNS AND OTHER PROVISIONS

SECTION 12 – 1 NONCONFORMING SIGNS:

(A) Purpose: For the purpose of promoting aesthetics, protecting the environment, and regulating excess signage, encouraging the positive economic development

of the City, promoting the safety of the traveling public, protecting existing property values in both residential and non-residential areas, preventing overcrowding of land, promoting a positive community appearance as part of a concerted city-wide effort to protect and enhance the aesthetics of the City of Murfressboro for the enjoyment of all citizens, the nonconforming signs are herein regulated.

The regulations are designed to prevent a public nuisance through the over-concentration, improper placement, and excessive height, bulk, enlargement, number, and area of signs. It is intended that outdoor advertising signs be located away from residential areas, and that such signs be regulated to protect the character of the area wherein signs are located, and to conserve property values in these areas.

(B) Extension or expansion: A nonconforming sign shall not be enlarged, expanded, extended, or structurally altered so as to create an additional nonconformity or to increase the extent of the existing nonconformity when the change is declared a nuisance by this Ordinance. This section shall not be construed to prohibit the changing of the message panel, provided there is no increase in the face area or height, or change in the face panel enclosing members. Nothing herein allows a nonconforming sign to be placed nearer to a right-of-way property line or power line than permitted by this ordinance.

(C) No nonconforming sign shall be removed and replaced or reconstructed on a different lot of record unless the replacement or reconstructed sign conforms to all applicable provisions of this Ordinance. Any sign in

violation of the *National Electric Code* or located in whole or part on the public right-of-way is an unlawful nonconforming sign and shall not be replaced or altered unless it conforms with all provisions of this sign ordinance.

(D) No nonconforming sign shall be removed and replaced or reconstructed on the same lot of record unless it conforms with the height and signable area limitations set forth below. A nonconforming sign that is removed and replaced or reconstructed on the same lot of record is declared to be a public nuisance if the sign area or height exceed the following in the zones and areas indicated.

(1) Commercial Highway or industrial zones where sign is more than two hundred (200) feet from residential zones:

(a) *Interstate Highway*

(i) Interstate On-Site

Nuisance if: > 345 sq. ft.
> 138' in height

(ii) Off-Site

Nuisance if: > 891 sq. ft.
> 58' in height

(iii) On-Site Ground Sign

Nuisance if: > 345 sq. ft.
> 40' in height

(b) *4 Lane Federal Aid Primary Highway*

(i) Off-Site

Nuisance if: > 460 sq. ft.
> 58' in height

(ii) On-Site

Nuisance if: > 345 sq. ft.
> 40' in height

(c) *Other Highways and Streets*

Nuisance if: > 345 sq. ft.
> 40' in height

2. Commercial Highway or Industrial Zones where sign is *WITHIN* two hundred (200) feet from Residential Zone.

(a) *Interstate Highway*

(i) Interstate On-Site

Nuisance if > 345 sq. ft.
> 19' in height

(ii) Off-Site

Nuisance if > 891 sq. ft.
> 19' in height

(iii) On-Site Ground Sign

Nuisance if > 345 sq. ft.
> 19' in height

(b) *4 Lane Federal Aid Primary Highway*

(i) Off-Site

Nuisance if > 460 sq. ft.
> 19' in height

(ii) On-Site

Nuisance if > 345 sq. ft.
> 19' in height

(c) *Other Highways and Streets*

Nuisance if > 345 sq. ft.
> 19' in height

(3) *All other zones other than residential zones:*

Nuisance if: > 115 sq. ft.
> 19' in height
unless flag which
may be 35' in height

(4) *Residential zones:*

Nuisance if: > 69 sq. ft.
> 19' in height
unless flag which
may be 35' in height

NOTE: The symbol ">" means "greater than".

(E) Attached signs in all zones shall be considered a nuisance if they exceed the signable area and height as provided in Section 9, On-Site signs.

(F) Due process hearing. Notwithstanding the foregoing, any owner of a nonconforming sign who believes that the foregoing limitations in subsection 12-1 (D) unduly restrict his ability to replace, or reconstruct a nonconforming sign and that his sign is not a nuisance, shall be entitled to a public hearing before the city council. The sign owner may request a public hearing before the city council. Notice of the public hearing will be published in the newspaper at least ten (10) days prior to the meeting of the city council. All interested persons shall be entitled to be heard at the public hearing on whether or not a nuisance in fact exists from the proposed expansion or replacement of a nonconforming sign. Nothing herein limits the right of the sign owner to

a hearing before the Board of Zoning Appeals as provided by law.

(G) ABANDONED NONCONFORMING SIGNS: Abandonment of any sign shall terminate the right to maintain such sign and the owner thereof shall be required to remove the sign.

Any nonconforming sign shall be considered abandoned in the following situations, regardless of any reservation of an intent not to abandon or of an intent to reserve the right to use the sign:

(1) An abandoned on-site or off-site permanent sign is a sign displaying no advertising message for a period of (i) one (1) year or more if the permanent sign is located within 200 feet of an interstate highway or (ii) 120 days otherwise. Copy on the sign indicating the sign is for lease or sale shall not be construed as the display of an advertising message for the purpose of this ordinance.

(2) Signs which advertise a terminated activity, business, product or service which has not been produced, conducted, sold or performed on the premises where the sign is located for a period of (i) one (1) year or more if the permanent sign is located within 200 feet of an interstate highway or (ii) 120 days otherwise.

SECTION 12-2. REMOVAL OF CERTAIN SIGNS

(A) PERMIT REQUIREMENTS. Demolition of any permanent sign or sign structures requires a permit and fee (see SECTION 3), except, no fee shall be required, if such demolition is being made in order to remove a legal non-conforming permanent sign.

(B) NOTICE TO REMOVE ILLEGAL NONCONFORMING SIGNS. If the Chief Building Official shall find that any sign does not conform to the provisions of this ordinance, except for legal non-conforming signs, he shall give written notice to the owners, agent, or person having the beneficial interest in the building or the premises on which such permanent sign is located. Removal of the permanent sign shall be effected within ninety (90) days after receipt of the notice from the Chief Building Official. Removal of temporary signs shall be effected within two (2) days after posting of notice on the sign or personal contact with owner or lessee. No notice will be given for temporary signs in the ROW. If such sign is not removed after the conclusion of such period, the Chief Building Official is hereby authorized to cause the sign to be removed forthwith at the expense of the owner, or lessee.

For the purpose of this subsection, the word "remove" shall mean:

(1) The sign face, along with posts, columns, or supports of ground signs, shall be taken down and removed from the property.

(2) The sign face and supporting structures of "projecting", "roof" or "attached" signs shall be taken down and removed from the property.

(3) The sign face of "painted attached signs" shall be removed by painting over the wall sign in such a manner as to completely cover up and hide from sight the sign in question.

(C) NOTICE TO REMOVE ABANDONED SIGNS. If the Chief Building Official shall find that any such permanent sign has not been removed within (i) one (1) year if the permanent sign is located within 200 feet of an interstate highway or (ii) 120 days otherwise, of cessation of a particular use, he shall give written notice to the owner, agent, or persons having the beneficial interest in the building or the premises on which such sign is located. Removal of the sign shall be effected within ten (10) days after receipt of the notice from the Chief Building Official. If such sign is not removed after the conclusion of such ten (10) day period, the Chief Building Official is hereby authorized to cause the sign to be removed forthwith at the expense of the owner, agent, or person having the beneficial interest in the building or premises on which such sign is located. For the purpose of this subsection, "removal" shall mean total removal of the sign structure if the sign is non-conforming and only removal of the sign face if the sign is otherwise conforming.

(D) NOTICE TO REMOVE UNSAFE SIGNS. If the Chief Building Official shall find that any sign is unsafe or insecure, or is a menace to the public, he shall be given written notice to the owner, agent, or person having the beneficial interest in the building or the premises on which such sign is located. Correction of the condition which caused the Chief Building Official to give such notice shall be effected within ten (10) days after receipt of the notice. If such condition is not corrected after the conclusion of such ten (10) day period, the Chief Building Official is hereby authorized to cause the sign to be removed forthwith at the expense of the owner, agent, or

person having the beneficial interest in the building or premises on on [sic] which such sign is located. Notwithstanding the foregoing provision, the Chief Building Official is authorized to cause any sign to be removed upon giving reasonable notice under the circumstances, at the expense of the owner, agent, or person having the beneficial interest in the building or premises on which sign is located, whenever he determines an emergency exists and that such sign is an immediate peril to person, or property of others.

(E) APPEAL. The owner of a non-conforming or abandoned sign which has been the subject of a notice of violation may appeal by filing a notice of appeal pursuant to section 15 of this ordinance no later than ten (10) days after receipt notice. Failure to appeal in the time specified will constitute a waiver of all rights to an appeal to the BZA. Failure to request a due process hearing within ten (10) days of the notice will constitute waiver of the right to an appeal when there is a right to a due process hearing.

(F) ANNEXATION. Nonconforming signs located in areas annexed into the City of Murfreesboro shall be subject to the same provisions as nonconforming signs in existence when this was initially passed.

(1) The following signs are required to be brought into compliance with these regulations within forty-five (45) days of the annexation: temporary signs; flashing; chasing; and blinking lights.

(2) Signs of this type that exist in a nonconforming status after the time specified shall cause the

sign to be removed at the expense of the owner, agent, or person having the beneficial interest in the building.

SECTION 13. ADMINISTRATION AND ENFORCEMENT

(A) ENFORCEMENT OFFICER. The Chief Building Official is hereby designated as the enforcement officer for this Ordinance. In addition to all other authority conferred by statute, ordinance or resolution, the Chief Building Official and/or their authorized representative shall have the following duties and powers:

(1) REVIEW AND ISSUE PERMITS. Review all applications for sign permits, issuing permits for those signs found to be in compliance with the provisions of this Ordinance.

(2) CONDUCT INSPECTIONS. Conduct location, footing and final construction inspections, and to conduct such other inspections of all permanent and temporary signs displayed in the City of Murfreesboro as necessary to require compliance with the provisions of this Ordinance.

(3) ISSUE NOTICES OF VIOLATION. Issue notices of violation or citation regarding any sign which is found to be in non-compliance with one (1) or more of the provisions of this Ordinance.

(4) CAUSE REMOVAL OF CERTAIN SIGNS. After giving any required notice, cause the removal of certain signs which are found to be in non-compliance with one (1) or more of the provisions of the Ordinance.

(5) ADMINISTRATIVE INTERPRETATIONS. Render, when called to do so, administrative interpretations regarding the provisions of this Ordinance and their effect on the display of any sign located or to be located in the City of Murfreesboro.

(6) MAINTENANCE OF RECORDS. Maintain all records necessary to the appropriate administration and enforcement of this Ordinance, including applications for variances and appeals.

SECTION 14. VIOLATIONS; PENALTIES (See also Section 3)

(A) VIOLATION AND PENALTY DEFINED. Violation of any of the provisions of this chapter or failure to comply with any of its requirements is hereby deemed and declared a violation of this Ordinance and subject to the penalties hereinafter provided and each day that such violation continues, shall constitute a separate and additional violation for each such day. Any person who violates this chapter or fails to comply with any of its requirements shall, upon conviction thereof, be fined in a sum not to exceed fifty dollars ($50.00) for each violation.

(B) SIGNS PLACED IN RIGHT-OF-WAY. Signs that exist in a nonconforming status placed in the public right-of-way shall be immediately confiscated by the City and the owner or responsible party for the sign shall be fined for each sign in violation for the sign's return, in addition to subsection 14(A):

(1) Signs 5 1/2 sq. ft. and under – $5.00 return fine

(2) Signs over 5 1/2 sq. ft. – $25.00 return fine

If the sign is not claimed within thirty (30) days, the city may consider it abandoned and destroy same.

(C) PERSONS SUBJECT TO PENALTY. The owner, tenant and/or occupant of any building, structure, premises or a part thereof, and any architect, builder, contractor, agent or other person, who commits, maintains, aids or participates in such violation, may be found guilty of a separate offense and suffer the penalties as herein provided.

SECTION 15. APPEALS, POWERS, DUTIES, VARIANCE CONDITIONS

SECTION 15-1. APPEAL (a) An appeal may be taken to the Board of Zoning Appeals by any person aggrieved by an order, requirement, decision, determination, or interpretation of the Chief Building Official and/or their authorized representative acting within the authority of this Ordinance.

(b) PETITION FOR APPEAL ON DECISION.

(1) An appeal shall be filed within 10 days from the date of the alleged erroneous order, requirement, decision, determination, or interpretation. Failure to appeal in the time specified will constitute a waiver of all rights to an administrative hearing.

(2) Such appeal shall be filed in writing with the Chief Building Official and shall be accompanied by such documents and information as Board of Zoning Appeals may by rule require.

(3) Each appeal to the Board of Zoning Appeals shall be accompanied by a fifty dollar ($50.00) fee to be paid at the time of filing of the appeal. However, the filing fee is waived if the appellant files a pauper's oath. In addition, the filing fee shall be refunded upon the successful appeal by the appellant. There will be no refund when a variance is granted or denied.

(4) TRANSMITTAL OF RECORD. The Chief Building Official shall, at the time of filing an appeal, forthwith transmit to the Board of Zoning Appeals all of the documents constituting a record upon which the action appealed from was taken.

(5) FILING. An appeal of alleged erroneous order, requirement, decision, determination, or interpretation shall be filed in writing with the Chief Building Official and shall include the following information:

(A) The names, addresses, and telephone number of the petitioner, the owner of the property on which the sign is to be erected or affixed, the owner of the sign, and the person to be erecting or affixing the sign.

(B) Decision being appealed.

(C) Description of the requested appeal.

(D) Question to be raised on appeal.

(E) Justification of the requested appeal.

(F) The location of the building, structure, or zoning lot on which the sign is erected, to be erected, or affixed.

(G) If the application involves a ground sign, a site plan of the property involved showing dimensions of the lot, improvements thereon and showing accurate placement thereon of the sign involved.

(H) A blueprint, ink drawing or photograph of the sign involved.

(I) Written consent of the owner of the building, structure, or property on which the sign is erected or to be erected or affixed.

(J) Such other information as the Chief Building Official may require to determine full compliance with his decision.

(6) EFFECT OF APPEAL. An appeal shall stay all proceedings in furtherance of the action appealed from unless the Chief Building Official certifies to the Board of Zoning Appeals, after the appeal has been filed with the Chief Building Official, that, by reason of the facts stated in the application, a stay would in his opinion cause imminent peril to life or property. In such case, the proceeding shall not be stayed unless a restraining order is issued by a court of record.

(7) BOARD OF ZONING APPEALS PUBLIC HEARING.

(A) TIMING. The appeal shall be scheduled for hearing by the said Board of Zoning Appeals at the next regular meeting or special meeting called for such purpose, following forty-five (45) days after the filing of an appeal thereof. The said board shall set any such appeal for hearing, giving such notice to the public or to the persons concerned as the board deems advisable.

(B) ATTENDANCE. The petitioner and Chief Building Official and/or their authorized representatives shall attend those meetings of the Board of Zoning Appeals at which an appeal is to be heard.

(8) BOARD OF ZONING APPEALS DETERMINATION. Following the hearing of any such appeal, the said board may affirm, reverse, or modify the action of the Chief Building Official and/or his representative, and may take any other action which is appropriate under the circumstances and is allowed by law. The action of the said board on any such appeal shall be final and conclusive.

(9) EFFECT OF BOARD DENIAL. No appeal which has been denied, wholly or in part, by the Board of Zoning Appeals, in accordance with the provisions established herein, upon which no variance has been granted, may be resubmitted for a period of one (1) year from the date of said denial, except on grounds of new evidence or proof of changed conditions found to be valid by the Board.

(10) MAINTENANCE OF RECORDS. The Chief Building Official shall maintain complete records of all findings of fact and recommendations of the Board of Zoning Appeals and all determinations of the Board relative to an appeal. All such records shall be open to the public for inspection.

SECTION 15-2. VARIANCES. Where, by reason of extraordinary and exceptional situations or condition of such parcel of real estate, the strict application of any regulation enacted under this ordinance would result in

peculiar and exceptional practical difficulties to or exception or undue hardship upon the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship; provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

(b) PETITION FOR VARIANCE.

(1) STANDING. A petition for a variance from any provision(s) of this Ordinance may be made by any person having a proprietary interest in the sign for which such variance is requested.

(2) FILING. A variance request shall be filed in writing with the Chief Building Official and shall include the following information:

(A) The names, addresses, and telephone number of the petitioner, the owner of the property on which the sign is to be erected or affixed, the owner of the sign, and the person to be erecting or affixing the sign.

(B) A description of the requested variance.

(C) Justification of the requested variance.

(D) The location of the building, structure, or zoning lot on which the sign is to be erected or affixed.

(E) If variance involves a ground sign, a site plan of the property involved, showing dimensions of the lot, improvements thereon, accurate placement thereon of the proposed sign.

(F) A blueprint, ink drawing, or photograph of the sign involved.

(G) The written consent of the owner or lessee of the building, structure, or property on which the sign is to be erected or affixed.

(H) Such other information as the Chief Building Official may require to determine full compliance with this and other applicable ordinances of the City of Murfreesboro.

(3) FEE. Each variance request to the Board of Zoning Appeals shall be accompanied by a fifty dollar ($50.00) fee to be paid at the time of filing of the variance request.

(c) BOARD OF ZONING APPEALS PUBLIC HEARING

(1) TIMING. The Board of Zoning Appeals shall hold a public hearing on a variance request at the next regular meeting or special meeting called for such purpose, following forty-five (45) days after the filing of an appeal thereof.

(2) ATTENDANCE. The petitioner and Chief Building Official and/or their authorized representatives shall attend those meetings of the Board of Zoning Appeals at which a variance is to be heard.

(d) STANDARDS FOR VARIANCE. It is the intent of this Ordinance to use variances only to modify the application of any of the provisions of this ordinance where there are practical difficulties or where unusual hardships may result.

The said Board shall not grant a variance unless it makes findings based upon evidence presented it as follows:

(1) The conditions upon which the petition for a variance is based would not be applicable generally to other property within the same district.

(2) If the condition complained of by the appellant is a general or wide spread condition, then a variance shall not be permissible. Financial factors alone shall not be considered as a basis for granting a variance.

(3) The alleged difficulty or hardship has not been created by any person having an interest in the property after the effective date of this ordinance.

(4) The proposed variance will not increase the danger of fire or endanger the public safety.

(e) BOARD DETERMINATION. The Board may grant, deny, wholly or in part, or modify said variance request as it determines appropriate.

(f) EFFECT OF DENIAL. No requested variance which has been denied wholly or in part by the Board in accordance with the provisions established herein, may be resubmitted for a period of one (1) year from the date of said denial, except on ground of new evidence or proof of changed conditions found to be valid by the Board.

(g) BOARD REVOCATION. In any case where a variance has been granted, and where no work pertinent thereto has been initiated within six (6) months (180 days) from the date of the Board approval of the requested variance, then without further action by either the Chief

Building Official or Board of Zoning Appeals, said variance shall become null and void.

(h) MAINTENANCE OF RECORDS. The Chief Building Official shall maintain complete records of all findings of fact and recommendations of the Board of Zoning Appeals and all determinations relative to variance applications. All such records shall be open to the public for inspection.

SECTION 15-3. OTHER REMEDIES

In addition to all other remedies, the City of Murfreesboro may institute any appropriate action or proceeding to prevent, restrain, correct, or abate any violation of this Ordinance.

SECTION 16. INTERPRETATION

That all words herein in the singular number shall include the plural and the present tense shall include the future and the masculine gender shall include the feminine and neuter.

SECTION 17. CONFLICTING CODES AND ORDINANCES.

If any provision or requirement of this Ordinance is found to be in conflict with any other provision or requirement of this Ordinance or of any other applicable governmental law, ordinance resolution, rule, or other governmental regulation of any kind, the regulation which establishes the more restrictive rule or higher standard shall govern.

SECTION 18. VALIDITY (SEVERABILITY)

If any section, clause, provision or portion of this ordinance is held to be invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect any other section, clause, provision or portion of this ordinance which is not of itself invalid or unconstitutional.

SECTION 19. EXERCISE OF POLICE POWER, ETC.

This entire ordinance shall be deemed and constructed to be an exercise of the police power of the City of Murfreesboro, State of Tennessee, for the preservation and protection of the public's health, safety, morals and general welfare, to promote aesthetics, and protect the environment, and pursuant to all other powers and authorities for the aforesaid purposes, and all of its provisions shall be liberally constructed with a view to effectuation of such purposes.

SECTION 20. SUPERSEDES PREVIOUS ORDINANCE.

This ordinance supersedes the sign ordinance passed on February 14, 1995, as amended. Nothing in this ordinance makes legal the signs which have been constructed in violation of the previous ordinance, as amended, unless the sign conforms to all the requirements of this ordinance.

SECTION 21. EFFECTIVE DATE

This this [sic] Ordinance take [sic] effect fifteen (15) days after its passage upon third and final reading, the public welfare and the welfare of the City requiring it.

PASSED and SIGNED, this 16th day of August, 1990.

/s/ Illegible
MAYOR

ATTEST:

/s/ Illegible
City Recorder

The foregoing Ordinance approved
as to form, this the 16th day of August, 1990.

/s/ Illegible
City Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

OUTDOOR COMMUNICATIONS, INC., Plaintiff,	:	CIVIL ACTION FILE NO.
v.	:	3-90-0231
CITY OF MURFREESBORO, TENNESSEE, Defendant.	:	Judge Higgins

AFFIDAVIT OF LOUIE E. AKINS, JR. IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 30, 1991)

Before me, the undersigned notary public, personally appeared Louie E. Akins, Jr., who, after being duly sworn according to law, did depose and say on oath as follows:

1.

My name is Louie E. Akins, Jr. This affidavit is being given in support of plaintiff's motion for summary judgment and may be used as evidence in this case and for all purposes allowed by law. I am over the age of 21 and am competent to testify to the matters stated herein. I have personal knowledge of the facts stated in this affidavit.

2.

I am the division manager for Outdoor Communications, Inc. ("OCI"). My division encompasses the City of Murfreesboro, Tennessee. My responsibilities include the following: overall sales within my division; overall operations, including land leasing, permitting, and construction and maintenance of billboard structures; public relations; hiring and firing of all employees; and preparation and implementation of an annual budget.

3.

Plaintiff is a corporation engaged in the outdoor advertising business mainly in the southeastern United States. OCI has erected and currently maintains 44 off-site sign structures in the City of Murfreesboro. Murfreesboro is OCI's second largest market in the State of Tennessee.

4.

There is only one interstate highway in Murfreesboro traversing approximately 5 miles across the City.

5.

Plaintiff desires to construct new off-site sign structures in the City of Murfreesboro.

6.

The effect of the Sign Ordinance enacted by the City of Murfreesboro in 1990 is to prohibit the erection of new

off-site signs by private companies. While the Sign Ordinance appears to allow private companies to erect new off-site signs in accordance with the restrictions contained in Section 10 of the Ordinance, the Ordinance actually prohibits all new off-site signs because there are no locations in the City of Murfreesboro to erect new off-site signs that would be in compliance with the restrictions contained in the Ordinance.

7.

Off-site sign structures are used by plaintiff in the operation of its outdoor advertising business.

8.

Advertising on off-site sign structures is sold or donated to persons desiring to communicate commercial, noncommercial or political messages.

9.

Each of plaintiff's off-site sign structures is used for both commercial and noncommercial messages.

10.

All of the off-site sign structures maintained by the plaintiff are situated on privately owned property. None are maintained on highway rights-of-way.

11.

The messages posted or painted on the off-site sign structures owned by plaintiff are changed periodically and provide information about goods, products, services, activities, ideas and events. These signs provide a medium for commercial, political and noncommercial speech.

12.

Many persons rely on outdoor advertising to disseminate information to the public because other forms of advertising are insufficient, inappropriate or too expensive.

13.

Construction of new signs is necessary to the operation and maintenance of plaintiff's outdoor advertising business.

14.

On occasion, OCI needs to replace an existing off-site sign by reason of eminent domain, sale of the land by the lessor or other reasons.

15.

Prior to the enactment of the 1990 Sign Ordinance, OCI was not limited to erecting and maintaining off-site signs only along the interstate highway. OCI had erected

and maintained off-site signs in commercial and industrial areas throughout the City regardless of whether they were contiguous to the interstate highway, and regardless of whether the off-site sign was at least 5 feet and no more than 200 feet from the street or interstate highway right-of-way.

16.

Prior to the enactment of the 1990 Sign Ordinance, OCI could replace an existing off-site sign that was lost by reason of the exercise of eminent domain, transfer of the underlying land or otherwise.

17.

Under the 1990 Sign Ordinance, most of OCI's signs are nonconforming. If OCI is unable to replace or reconstruct its signs, this will cause OCI a loss of approximately $1,850,000.

18.

I have read plaintiff's amended complaint and participated in writing this pleading. All of the factual allegations contained in the amended complaint are true and correct.

FURTHER AFFIANT SAYETH NOT.

/s/ Louie E. Akins, Jr.
LOUIE E. AKINS, JR.

SUBSCRIBED AND SWORN TO
before me this 25th day of
April, 1991.

/s/ Melissa S. Carroll
NOTARY PUBLIC

My commission expires:
Notary Public, Floyd County, Georgia
My Commission Expires January 2, 1994

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for defendant in the foregoing matter with a copy of affidavit of Louie E. Akins, Jr. in support of plaintiff's motion for summary judgment by depositing a copy of same in the United States First Class Mail in a properly addressed envelope with adequate postage affixed thereon addressed to:

Thomas L. Reed, Jr., Esq.
Reed & Watson
117 East Main Street
Murfreesboro, TN 37130

George A. Dean, Esq.
Fifth Floor, 200 Fourth Avenue North
Nashville, Tennessee 37219

This 30th day of April, 1991.

/s/ Granville S.R. Bouldin
GRANVILLE S.R. BOULDIN
Attorney for Plaintiff

Supreme Court, U.S.
FILED
DEC 15 1995
OFFICE OF THE CLERK

No. 95-772

In The

Supreme Court of the United States

October Term, 1995

OUTDOOR COMMUNICATIONS, INC.,

Petitioner,

vs.

CITY OF MURFREESBORO, TENNESSEE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below misapplied Tennessee law and abused their discretion in severing unconstitutional provisions in a sign ordinance, instead of striking the entire ordinance, when the comprehensive ordinance contained a severability clause.

2. Whether, as part of a comprehensive sign ordinance, a city may require any person flying a flag to obtain a permit and pay a moderate fee if the flag is over a specified size and is intended to be permanent.

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II. The Court of Appeals correctly held that a city may require any person flying a flag to obtain a permit and pay a moderate fee as part of a comprehensive sign ordinance if the flag is over a specified size and is intended to be permanent. 6

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I

STATEMENT OF THE CASE

A. Statement of Facts

The sign ordinance adopted in 1990 by Respondent, the City of Murfreesboro, Tennessee, regulated the erection and maintenance of all signs, on-site, off-site, temporary, and existing non-conforming in the city. Petitioner's Appendix, "App.", pp. 59a-123a. One stated reason for adoption of the ordinance was to restrict signs and lights from distracting drivers of motor vehicles and from obstructing their vision. Additionally, Respondent sought to reduce conflict between public and private information systems, to protect the environment and the public health, safety, comfort, morals and convenience, to promote aesthetics, and to enhance the economy, business and industry of the city. The Respondent required permits and fees for all signs, banners, billboards, flags, and similar structures, except for fifteen (15) exempted categories. The category of American, State, City and County flags was one of those exempted from the permit and fee requirement.

This exemption was held below to have created an impermissible distinction between signs based on their speech content. App., p. 4a. With the striking of this exemption, American, state, city and country flags would not be exempt from the ordinance's permit and fee requirements, unless they were exempt under another, remaining category. One such category exempts signs smaller than four and one-half square feet in area; another category exempts temporary signs, other than inflatable and portable signs. App., p. 82a. The ordinance does not make it a crime to display an American flag in excess of four and one-half square feet. There are no facts or citations of authorities in the record about an "official" size of the American flag.

The ordinance contains restrictions on off-site signs. No requirement of the ordinance explicitly prohibits the construction

of new off-site sign structures. Off-site sign restrictions are based on the proximity of the sign to an interstate highway and compliance with several distance requirements. App., p. 102a. The Petitioner submitted an affidavit asserting that the sign ordinance prohibited the construction of any new, off-site signs in the City. App., pp. 5a-6a. This assertion was disputed, the City submitted an affidavit to the contrary effect from the Chief Building Official. Respondent's Appendix. pp. 1a-3a. The creation of a new interstate within the city affording the opportunity for new off-site signs was put forth both in this affidavit, and at oral argument below, without contradiction. Respondent's App., p. 2a, App., p. 7a. The Sixth Circuit expressly rejected Petitioner's assertion and held that the ordinance did not prohibit all new off-site signs. App., p. 7a.

The ordinance explicitly states that "If any section, clause, provision or portion of this ordinance is held to be invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect any other section, clause, provision or portion of this ordinance which is not of itself invalid or unconstitutional." App. p. 122a.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY APPLIED TENNESSEE LAW AND DID NOT ABUSE ITS DISCRETION IN SEVERING UNCONSTITUTIONAL PROVISIONS IN A SIGN ORDINANCE INSTEAD OF STRIKING THE ENTIRE ORDINANCE, WHEN THE COMPREHENSIVE ORDINANCE CONTAINED A SEVERABILITY CLAUSE.

Severability of a local ordinance is a question of state law. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 772

(1988); *INS v. Chadha*, 462 U.S. 919, 931-34 (1983). It is the duty of the courts to give effect to a severability clause and to make an elision, so as not to invalidate an entire act, if possible. *Moore v. Fowinkle*, 512 F.2d 629, 632 (6th Cir. 1975) citing *Carr v. State ex rel. Armour*, 196 Tenn. 256, 265 S.W.2d 556, 558 (Tenn. 1954). The presence of the severability clause within a statute evidences an intent on the part of the legislature to have the valid parts of the statute left in force if some part is declared unconstitutional. *Catlett v. State*, 336 S.W.2d 8, 10 (Tenn. 1960). It is clear that the Murfreesboro City Council's intent, based upon the presence of a severability clause, was to have the sign ordinance remain valid after the severance of any invalid or unconstitutional provisions. This Court has held that a statute is presumed divisible, where the legislature provides that the invalidity of any section shall not affect the validity of others. *Williams v. Standard Oil of Louisiana*, 278 U.S. 235 (1929); *Ellwest Stereo Theater Inc. v. Boner*, 718 F. Supp. 1553, 1581 (M.D. Tenn. 1989).

The Sixth Circuit Court of Appeals was correct in upholding the trial court's decision that the Murfreesboro sign ordinance was constitutionally valid after severing portions which created a distinction between signs based on their content. The severed portions exempted certain signs from the ordinance's requirement that a permit be obtained and a fee paid. The effect of striking the exemptions was to require that a permit be obtained and the fee paid.

Petitioner incorrectly asserts that deleting the exemptions created a ban on: flags, address signs, convenience signs, governmental signs, holiday decorations signs, address plaques, ball field signs, and signs on glass surfaces. No such finding was made by the magistrate, the trial court, or the Court of Appeals and no such finding is justified by the language in the sign ordinance. Petitioner is also mistaken in asserting that such signs

are not allowed by any other provision of the sign ordinance. That flags were not banned by the deletion of the permit and fee exemption is shown by Section 11(D) of the sign ordinance, which prohibits any flag from being tattered, torn or faded, and from being improperly attached, App., p. 103a, and by Section 9, where the specifications for permissible flags are described, App., pp. 95a, 99a. Neither of these provisions were stricken by the courts below.

After severance, the ordinance logically and coherently exempted signs that were either temporary, or small enough not to interfere with traffic, from the fee and permit requirements.

This Court need not accept the writ to resolve a conflict between the Courts of Appeal. The Sixth Circuit Court of Appeals has not directly contradicted the holding of the Third Circuit Court of Appeals in *Rappa v. New Castle County,* 18 F. 3d 1043 (3rd Cir. 1994). There are legal and factual differences between the two cases. In *Rappa,* the Third Circuit severed one section of a three section statute because that section exempted certain signs, based on content, from a general ban on signs on or near the right of way for interstate highways. After deleting the exemption as unconstitutional, the *Rappa* court decided to strike the entire section of the statute because it would restrict more speech as amended than the legislative body initially intended.

Rappa involved a total prohibition of speech; if the statute had been upheld, signs advertising local industries and meetings would have been completely banned. As the Sixth Circuit Court observed, this case involves a reasonable permit and fee requirement; there are constitutionally significant differences between a total prohibition of speech and a place and manner restriction of speech. App. p. 7a. Only if one merges them into a generic "more restrictive" standard, as urged by Petitioner, are the opinions in legal conflict.

The *Rappa* court did not have a specific indication of legislative intent in the statute in question to guide its severance analysis; its decision was based only on a general Delaware state statute on elision. Factually distinct, the Murfreesboro ordinance's intent is to regulate all outdoor advertising signs yet it contains "specific evidence" of a legislative preference for elision since it contains a severability clause. App., pp. 60a-64a, p. 122a. In addition to the severability clause, Section 17 of the ordinance supports the conclusion of the courts below that elision, rather than striking the entire ordinance, was the legislative intent. Section 17 provides that if any provision of the ordinance is found to be in conflict with any other applicable governmental law, that the regulation which establishes the more restrictive rule or higher standard should govern. App., p. 121a. By severing the exemptions from the permit and fee requirements a more restrictive or higher standard was created. The expressed preference of the adopting body was for such higher standard; the absence of any standard, as would result from striking the entire ordinance, was clearly disfavored. This provision of the Murfreesboro sign ordinance further distinguishes it from the situation in *Rappa* where there was no expressed legislative willingness to restrict speech more than the law in question provided. Because of these factual distinctions between the cases, and the possible differences between Delaware and Tennessee state laws on severability, the severance decision was within the discretion of the courts below; the Petitioner simply disagrees with the conclusion of the magistrate, the trial judge and the Court of Appeals as to Respondent's legislative intent. App. p. 56a, fn. 5, App. p. 24a, App. pp. 3a-4a.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT A CITY MAY REQUIRE ANY PERSON FLYING A FLAG TO OBTAIN A PERMIT AND PAY A MODERATE FEE AS PART OF A COMPREHENSIVE SIGN ORDINANCE IF THE FLAG IS OVER A SPECIFIED SIZE AND IS INTENDED TO BE PERMANENT.

Neither the Murfreesboro sign ordinance, nor the Court of Appeals' interpretation of it, make it a crime to fly an American flag as asserted by Petitioner.

The Murfreesboro sign ordinance allows flags to be used as temporary signs, Section 8; as on-site permanent signs, Section 9; and, as off-site permanent signs, Section 10. The sign ordinance requires persons seeking to erect a sign within the City to first obtain a sign permit and to pay the permit fee, Section 3. From this general requirement of obtaining a sign permit and paying a permit fee, the City exempted certain signs. Several exemptions from obtaining a permit and paying a fee were held to be unconstitutional and severed. After such severance, fewer signs were exempt from the permit process. Exemptions remained for signs that were temporary in nature (except for inflatable and portable signs) and for signs that were less than four and one half square feet in surface area. Flag signs that were permanent and in excess of four and one half square feet in surface area were thus not exempt from the permit and fee requirement, regardless of their content. The ordinance required that all permanent outdoor flags in excess of a specified size, whether advertising a car dealership or an American flag, meet uniform standards. This content-neutral regulation of all flag signs was a reasonable time and manner restriction.

The Petitioner is incorrect in stating that the ordinance does

not provide for the issuance of a flag permit and in implying that persons must obtain a variance, by showing a hardship, in order to display a flag larger than four and one half square feet. Petition, p. 11, fn. 3. Section 3 of the ordinance describes the permit procedure to be followed for different types of signs. App., p. 73a-75a. Flag signs are classified as "ground signs" when permanent in Section 9(c) of the ordinance at subsections (1)(d), (2)(d), and (4)(c). App., pp. 94a-99a. Therefore, the permit procedure for "ground signs" described in Section (3), would apply to permanent flags. App., p. 74a.

No variance is needed to fly a permanent flag larger than four and one half square feet. The provisions of Section 9(C)(1)(d), 9(C)(2)(d) and 9(C)(4)(c) state that flags shall have a maximum size of 32 square feet each and that eight flags (4 per entrance) are allowed on each lot.[1]

If, and only if, a landowner wanted to permanently fly a flag larger than 32 square feet in size, or to permanently fly more than eight flags per lot, would a variance under Section 15-2 of the ordinance be necessary. App., pp. 117a-121a.

For these reasons, the Petitioner's statement of the second question presented is incorrect in suggesting that the ordinance made it a crime to fly an American flag in excess of four and one half square feet. The Petitioner also mistakenly states that "the size of the official American flag is 13.35 square feet". No authority for this proposition was cited. A federal statute establishes the content of the official flag of the United States but does not establish its size. 4 U.S.C.S. § 1. Executive Order No. 10834 of August 21, 1959, 24 Fed. Reg. 6865, authorizes certain

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1. If the flag were a temporary flag, no permit would be required, the number would be limited to three per lot, and the maximum size of each flag would vary, based on the zoning of the lot, from 16 to 64 square feet. App., pp. 90a-91a.

flag sizes for the executive branch of the United States government; Part II, Sec. 21 (11), authorizes several flag sizes, including a flag with a dimension of 1.32 feet by 2.50 feet. Such a flag would be less than four and one half square feet in area (3.3 square feet).

Even if the Petitioner's statement of the question presented and its description of the official size of the flag were correct, this issue is moot. Although not made a supplemental part of the record below, the Murfreesboro City Council amended the sign ordinance in 1994 to provide that three flags per zoned lot are exempt from the permit and fee requirement. Since that legislative change, there can be no claim of an unlawful burden on the right to fly a large American flag.

CONCLUSION

City of Murfreesboro, Tennessee, prays that this Court deny Outdoor Communication, Inc.'s Petition for Writ of Certiorari, because the Court of Appeals ruling was correct. The ruling does not conflict with other decisions of this Court or of other Circuit Courts of Appeal. This Court need not resolve a dispute over the application of state principles of severance and elision. Acceptance of this case is not necessary to protect the right to fly the American flag. There are no compelling reasons under Supreme Court Rule 10.1(a) or otherwise for the writ to be granted.

Respectfully submitted,

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APPENDIX — AFFIDAVIT OF BETTS M. BARBIER SWORN TO MAY 28, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CIVIL ACTION
FILE NO. 3 90 0231
JUDGE HIGGINS

OUTDOOR COMMUNICATIONS, INC.

Plaintiff,

CITY OF MURFREESBORO, TENNESSEE,

Defendant.

AFFIDAVIT OF BETTS M. BARBIER IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF TENNESSEE)
:SS
RUTHERFORD COUNTY)

Before me, the undersigned Notary Public, personally appeared BETTS M. BARBIER, who, after being duly sworn according to law, did depose and state on oath as follows:

1. My name is BETTS M. BARBIER. I am the Chief Building Official for the City of Murfreesboro, Tennessee. As a part of my official duties, I am responsible for the issuance of sign permits and enforcement of the provisions of the Sign Ordinance of the City of Murfreesboro, adopted on August 16, 1990.

2. Because of my responsibility to enforce the Sign

Appendix

Ordinance and building and housing codes for the City of Murfreesboro, I am aware of the municipal boundaries of the City. I am further aware that the City Council periodically considers the annexation of additional territory into the City. The annexation of the additional territory may result in an additional off-site billboard locations becoming available within the City. While Interstate 24 is the only interstate highway presently located within the boundaries of the City of Murfreesboro, I am aware of the proposed construction of Interstate 840 in the Murfreesboro area which may result in additional interstate highway frontage within the municipal boundaries.

3. While off-site billboards are used in the City of Murfreesboro, there are other available means of advertising and disseminating information. The City of Murfreesboro is served by *The Daily News Journal*, a newspaper published daily within the City and *The Rutherford Courier*, a weekly newspaper publication. Daily editions of *The Tennessean* and *The Nashville Banner*, two newspapers published in Nashville, Tennessee are also distributed daily within the City of Murfreesboro.

4. The City of Murfreesboro is served by at least five broadcast commercial television stations including WNGE, Channel 2 in Nashville, WSMV, Channel 4 in Nashville, WTVF, Channel 5 in Nashville, WZTV, Channel 17 in Nashville and, WMTS, Channel 27 in Murfreesboro. The City of Murfreesboro is also served by a cable television system operated by United Artists. I have personally observed commercial advertising and the dissemination of non-commercial information from Murfreesboro businesses and other entities in the newspapers distributed within the City of Murfreesboro and on cable and broadcast television.

5. While construction of new billboards may be desirable to the Plaintiff in this suit, such construction is not mandatory for the continuation of their business within the City. The Sign Ordinance does not require the removal of non-conforming signs, and those non-conforming signs can be legally maintained within the City for an indefinite period. Even if the owner of a sign structure desires to demolish and rebuild an existing non-conforming sign structure, that right is preserved under the 1990 Sign Ordinance, subject to the requirement that the reconstructed sign conformed to certain height and area requirements.

6. I know of no instance in which an off-site billboard was required to be demolished as a result of eminent domain proceedings initiated on the part of the City of Murfreesboro.

Further Affiant saith not.

/s/ Betts M. Barbier
BETTS M. BARBIER

Sworn to and subscribed before me, this the *28th* day of May, 1991.

/s/ Mary F. Reed
NOTARY PUBLIC

My Commission Expires: *1-12-92*

Appendix

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing AFFIDAVIT OF BETTS M. BARBIER IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT was mailed to Mr. Granville S. R. Bouldin, BOULDIN & BOULDIN, 122 North Church Street, Murfreesboro, Tennessee, 37130 and Mr. David H. Clint and Susan H. Sarch, SCHREEDER, WHEELER AND CLINT, 1600 Candler Building, 127 Peachtree Street, N.E. Atlanta, Georgia 30303-1845, on this the *28th* day of May, 1991.

/s/ J. Lynn Watson
J. Lynn Watson
Assistant City Attorney